INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

SOUTH WEST AFRICA CASES

(ETHIOPIA *v.* SOUTH AFRICA;
LIBERIA *v.* SOUTH AFRICA)

VOLUME IV

1966

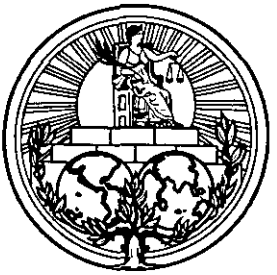
COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRES DU SUD-OUEST AFRICAIN

(ÉTHIOPIE c. AFRIQUE DU SUD;
LIBÉRIA c. AFRIQUE DU SUD)

VOLUME IV



LIST OF ABBREVIATIONS

A.D.	Appellate Division of the Supreme Court of South Africa
A.F.P.	Agence France Presse
A.J.I.L.	The American Journal of International Law
A.M.I.C.E.	Associate Member of the Institute of Civil Engineers
A.P.S.R.	The American Political Science Review
Bib. Un.	Bibliothèque universelle et Revue de Genève
B.Y.B.I.L.	The British Year Book of International Law
C.	Blue Books: United Kingdom
C.L.J.	The Cambridge Law Journal
C.L.R.	Commonwealth (Australia) Law Reports
cub.	cubic
°C.	Degrees Centigrade
ft.	feet
G.A.	General Assembly
G.N.	Government Notice
Grotius Soc.	Transactions of the Grotius Society
Ha.	Hectare(s)
H.M.S.O.	Her/His Majesty's Stationery Office
I.L.A., Rep.	International Law Association, Reports
I.L.O.	International Labour Organisation
in.	inches
K.B.	King's Bench Division (England)
km.	kilometre(s)
L. of N., Assembly, Rec.	League of Nations, Assembly, Records
L. of N., *Council, Min.*	*League of Nations, Council, Minutes*
L. of N. Doc.	League of Nations Document
L. of N., O.J.	League of Nations, Official Journal
L. of N., O.J., Spec. Sup.	League of Nations, Official Journal, Special Supplement
m.	metre(s)
Mk.	Mark (unit of currency)
mm.	millimetres
N.A.	Archive of the Secretary of Native Affairs, Cape Colony
N.L.R.	Natal Law Reports
O.R.	Official Records
Ord.	Ordinance
P.M.C., *Min.*	*Permanent Mandates Commission, Minutes*
Proc.	Proclamation
Quellen	Quellen zur Geschichte von Südwestafrika
R.	Rand (unit of curency)

R.D.I.	Revue de droit international et de législation comparée
R. of S.A., Parl. Deb., House of Assembly	Republic of South Africa, Parliamentary Debates. House of Assembly
S.A.	South Africa
S.A.L.J.	The South African Law Journal
S.A.L.R.	South African Law Reports
S.C.	Security Council
sq.	square
S.R. & O.	Statutory Rules and Orders and Statutory Instruments
S.W.A.	South West Africa
S.W.A.	High Court of South West Africa (only in Table of Cases Cited)
S.W.A.N.L.A.	South West Africa Native Labour Association
T.C.	Trusteeship Council
T.P.D.	Transvaal Provincial Division of the Supreme Court of South Africa
U.N.	United Nations
U.N.C.I.O.	United Nations Conference on International Organization
U.N. Doc.	United Nations Document
U.N.P.C.	United Nations Preparatory Commission
U. of S.A., Parl. Deb., House of Assembly	Union of South Africa, Parliamentary Debates, House of Assembly
U. of S.A., Parl. Deb., House of Assembly/Senate	Union of South Africa, Parliamentary Debates, House of Assembly/Senate
U. of S.A., Parl. Deb., Senate	Union of South Africa, Parliamentary Debates, Senate

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VOLUME IV

The present volume contains Books VIII to X and the Supplement to the Counter-Memorial and the Reply filed in the *South West Africa* cases. The proceedings in these cases, which were entered on the Court's General List on 4 November 1960 under numbers 46 and 47, were joined by an Order of the Court of 20 May 1961 (*South West Africa, Order of 20 May 1961, I.C.J. Reports 1961*, p. 13). Two Judgments have been delivered, the first on 21 December 1962 (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319), and the second on 18 July 1966 (*South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6).

The page references originally appearing in the pleadings have been altered to correspond with the pagination of the present edition. Where the reference is to another volume of the present edition, the volume is indicated by a roman numeral in bold type.

The Hague, 1966.

Le présent volume reproduit les livres VIII à X du contre-mémoire, le supplément au contre-mémoire et la réplique déposés dans les affaires du *Sud-Ouest africain*. Ces affaires ont été inscrites au rôle général de la Cour sous les nos 46 et 47 le 4 novembre 1960 et les deux instances ont été jointes par ordonnance de la Cour le 20 mai 1961 (*Sud-Ouest africain, ordonnance du 20 mai 1961, C.I.J. Recueil 1961*, p. 13). Elles ont fait l'objet de deux arrêts rendus le 21 décembre 1962 (*Sud-Ouest africain, exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 319) et le 18 juillet 1966 (*Sud-Ouest africain, deuxième phase, arrêt, C.I.J. Recueil 1966*, p. 6).

Les renvois d'un mémoire à l'autre ont été modifiés pour tenir compte de la pagination de la présente édition. Lorsqu'il s'agit d'un renvoi à un autre volume de la présente édition, un chiffre romain gras indique le numéro de ce volume.

La Haye, 1966.

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SECTION A

SUPPLEMENTAL MATERIAL IN REGARD TO THE ALLEGED VIOLATION BY RESPONDENT OF ARTICLE 2 OF THE MANDATE

CHAPTER I

INTRODUCTORY

1. Chapter VI of the Memorials contains, according to Applicants, "Supplemental material in regard to the alleged violation by [Respondent] of Article 2 of the Mandate", and it is alleged therein that whilst Chapter V of the Memorials sets out facts ". . . derived principally from official sources, including laws, proclamations, and administrative decrees in force in the Territory", Chapter VI contains material which illustrates "The manner in which the daily lives of inhabitants are affected thereby . . .". This material, it is stated, is derived from ". . . petitions received by the United Nations Committee on South West Africa from various persons and organizations in the Territory", and it is alleged that the cumulative effect of such petitions ". . . reinforces, in general, the factual allegations contained in Chapter V" of the Memorials [1].

It is alleged, furthermore, that the "probable accuracy in substance" of the allegations contained in the petitions is "confirmed by the fact that many incidents recounted in the petitions are predictable consequences of the pattern of [Respondent's] administration in the Territory", and it is stated that the petitions were received from a "wide . . . variety of independent sources" [1].

The extracts from the petitions cited in Chapter VI of the Memorials are submitted to the Court, so it is stated, "as typical and illustrative applications of [Respondent's] policies in the Territory" [1].

2. In Chapter II below Respondent deals with the extracts from the petitions relied on by Applicants.

A large number of allegations contained in these extracts amount to a repetition of allegations already made by Applicants in Chapter V of the Memorials. In order to obviate unnecessary duplication, Respondent will not give a detailed answer to all the allegations contained in the said extracts, but will from time to time, as convenience dictates, refer to those portions of this Counter-Memorial in which matters raised in Chapter VI of the Memorials have already been dealt with.

Respondent will, in its reply to the allegations contained in the said

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[1] I, p. 167.

extracts, demonstrate that the petitioners have generally not hesitated to exaggerate or misrepresent conditions in South West Africa, and that the complaints raised in the extracts are substantially, and in some cases entirely, without foundation.

3. In Chapter III below Respondent deals with Applicants' allegation that the said petitions emanate from a "wide . . . variety of independent sources". It will be shown that the majority of petitioners can in no way be regarded as "independent", but that they are persons who, as representatives of certain sectional interests in the Territory, have resorted to the regular practice of petitioning the United Nations Organization, all in furtherance of a general campaign directed at bringing about, by whatever means, an end to Respondent's administration of the Territory, and at establishing for the Territory "government of . . . Africans" [1].

[1] *Vide* Chap. III, para. 2, *infra*.

CHAPTER II

EXTRACTS FROM PETITIONS RELIED ON BY APPLICANTS

Paragraph B.1: Extract from a Communication Dated 30 October 1956 from Hosea Kutako to the Chairman of the Ad Hoc Committee on South West Africa[1]

1. This extract relates to a proposal made by Respondent to the inhabitants of the Aminuis Reserve to add to the said reserve a portion of the strip between the reserve and the Bechuanaland border, known as the Corridor (the Aminuis Herero call it Kuridora), in exchange for two inferior portions of the reserve which could not be effectively used because of a lack of a sufficient supply of water.

Due to a shortage of water, the Corridor had been uninhabited for many years. Attempts to find water had not met with success until efforts were made by the Administration to bore for water at great depths with a view to opening up the Corridor for development. It was necessary to bore to a depth of over 1,000 feet before the operations proved successful. Twenty-two boreholes, yielding good supplies of potable water, were the result of these efforts. It was considered that a portion of the land thus improved should be made available to the Aminuis inhabitants —hence the proposed exchange.

2. According to agricultural experts, the portion of the Corridor proposed to be added to the reserve was far more valuable from a farming point of view than the two portions of the reserve proposed to be exchanged for it.

3. Headman Hosea Kutako and the inhabitants of the reserve were consulted with regard to the proposed exchange. At the time of such consultation no decision had been made with regard to the future of the two portions of the reserve involved in the proposed exchange.

The advantages attaching to the proposed exchange were explained to the residents of the reserve as being, *inter alia*:

(a) The land to be added to the reserve was larger than the land to be excised therefrom, and it was also better prepared for development. The portion of the Corridor which it was proposed to add to the reserve had no less than 16 boreholes, and the carrying capacity of the area was in the vicinity of 10,000 cattle. The land proposed to be given in exchange had only three satisfactory boreholes, and its carrying capacity was about 3,000 cattle units.

(b) In terms of money, the value of the relevant portion of the Corridor was estimated as follows:

16 Boreholes at about R4,680 (£2,340) each	R74,880	(£37,440)
Pastoral and Agricultural value of land. .	R550,000	(£275,000)
Total . . .	R624,880	(£312,440)

[1] I, pp. 167-168.

The value of the portions of the reserve proposed to be exchanged was estimated as follows:

Borehole at "post 500"	R1,024	(£512)
Lister engine and equipment	R800	(£400)
Cement reservoir and drinking trough	R376	(£188)
Value of three further boreholes, approximately.	R8,000	(£4,000)
Pastoral and agricultural value of land. .	R300,000	(£150,000)
Total . . .	R310,200	(£155,100)

4. The proposal was rejected by Headman Hosea Kutako and his followers. Although the proposed exchange complied with the provisions of section 5 (1) of Act No. 56 of 1954 [1], the Minister of Bantu Administration and Development had no wish to force the exchange upon the inhabitants of Aminuis Reserve. The proposed exchange was therefore abandoned.

5. Although the Administration had, prior to the aforementioned negotiations, proposed opening up the Corridor for European settlement, it was subsequently decided that the Corridor would not be subdivided into farms, but would remain as an area which could be made available to farmers for grazing in times of drought. It was also decided that applications for grazing on that area, by Natives, including residents of the Aminuis Reserve, would receive the same consideration as applications by European farmers [2]. Subsequent to the latter decision, grazing and water points in the Corridor were in fact placed at the disposal of the inhabitants of the Aminuis Reserve.

6. With regard to the proposed exchange here in issue, Respondent wishes to emphasize:

(a) The exchange was intended to allow the Native population of the Aminuis Reserve to share in the benefits of the area (the Corridor) which had, as a result of costly improvements, been opened up for development by the Administration.

(b) The exchange was intended to be, and would have been, entirely to the advantage of the inhabitants of the Aminuis Reserve.

(c) Nothing was done without consultation, and when it transpired that Hosea Kutako and his followers were not in favour of the exchange, the proposal was abandoned.

7. Apart from the facts relating directly to the proposed exchange, as dealt with above, the extract from the petition here in issue also contains Hosea Kutako's alleged reason for objecting to the proposal. The first allegation in this regard is:

> ". . . our first Native Reserve was at Augeikas near Windhoek and the Government removed us from it in order to give the land to the Europeans. We were then given Otjimbondona from which we were removed in order to make room for European farmers. Finally we

[1] Act No. 56 of 1954, sec. 5 (1), in *Statutes of the Union of South Africa 1954*, p. 563. The said section requires, in the event of any part of a Native reserve being excised, a substitution of "land of at least an equivalent pastoral or agricultural value".

[2] *G.A., O.R., Fourteenth Sess., Fourth Comm.*, 915th Meeting, 19 Oct. 1959, para. 14, p. 168.

were given Aminuis Native Reserve with the assurance that it would be our permanent home [1]."

The allegation insinuates that reserves previously established for the inhabitants of Aminuis were taken away from them for purposes of European settlement.

This insinuation is without substance. At the inception of the Mandate it was necessary to reassemble Herero who were scattered over the Territory, and to establish them in reserves [2]. Among the reserves established for them, were Aminuis and Epukiro in the Gobabis district, which were set aside by Government Notice No. 122 of 1923 (S.W.A.) [3]. While the said reserves were being prepared for occupation, the prospective inhabitants were first assembled at farms such as Aukeigas, and from there, and elsewhere in the Territory, moved to other farms, including Otjimbondona and Scheidthof, along the road to the aforementioned reserves. The Herero who were on their way to Aminuis and Epukiro were accommodated on these farms purely temporarily, and had to wait there until the Aminuis and Epukiro reserves were ready for occupation. At the time when Hosea Kutako and his followers were temporarily accommodated as aforestated on Aukeigas and Otjimbondona, neither of these farms was a Native reserve. Hosea Kutako is thus incorrect in saying "... our first Native *Reserve* was at Augeikas ..." [1]. (Italics added.) He is also incorrect in stating that "... the Government removed us from it in order to give the land to the Europeans" [1]. In fact the said farm was not after their departure therefrom given out for European settlement at all. It remained unallocated land for a number of years until it was proclaimed a reserve for occupation by Dama in 1932.

The statement: "We were then given Otjimbondona from which we were removed in order to make room for European farmers" [1], is also incorrect. The said farm served merely as a place of temporary accommodation, as stated above, and was not intended to be, nor was it in fact, a Native reserve.

8. With regard to the allegation that "... the previous removals caused much hardships and were responsible for the loss of much of our *livestock and other property*" [1], Respondent points out that the previous moves referred to took place in the early 1920s, and were unavoidable if the Herero people were to be brought together and granted permanent homes. Everything possible was done to facilitate these moves and to minimize the loss of livestock on the way. In any event, the earlier moves, which were over long distances, could hardly be compared with that which would have been involved if the proposed exchange had been accepted. The latter would have entailed a removal of only a small number of people over a short distance to an area directly adjoining the Aminuis Reserve.

9. Regarding the allegation that "... Aminuis Native Reserve is too small for its inhabitants ..." [1], Respondent denies that this was the case in 1956 when this allegation was made, and further states that this has not been the case at any time up to the present.

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[1] I, p. 168.

[2] *Vide* Book VI, Chap. III, paras. 7, 24-33, of this Counter-Memorial.

[3] *G.N.* No. 122 of 1923 (S.W.A.), in *The Laws of South West Africa 1923*, pp. 84-88.

In 1956 the extent of Aminuis Reserve was approximately 555,795 ha., and this is still the position today.

The carrying capacity of the area is from 8 to 10 ha. per large stock unit [1], which means that the reserve has a carrying capacity of between 55,500 and 69,000 head of large stock.

The population of Aminuis has shown a tendency to remain more or ess constant. The statistics are as follows [2]:

1936	2,775
1946	2,252
1954	2,269
1956	2,840
1960	2,351
1963	2,806

The density of population has thus over the years remained at approximately one inhabitant to 200 ha. In 1956 the population of 2,840 consisted of 710 men, 958 women and 1,172 children [3]. Practically all the adult males were stock owners.

The livestock figures in the table below [2] indicate a large increase over the years, and afford a striking example of the economic progress of the Aminuis inhabitants:

Year	Large stock	Small stock	Large stock *per capita* of population	Small stock *per capita* of population
1937	11,907	17,876	4.3	6.4
1956	30,618	1,678	11.0	0.6
1963	47,048	25,367	16.8	9.0

It is thus clear, having regard to the carrying capacity of the reserve, that it has at no stage been too small for its inhabitants.

Paragraphs B.2 and B.3: Extracts from Communications Dated 10 January 1958, and 31 July 1958, from Johannes Dausab et al.[4]

10. The two extracts here in issue emanate from certain of the inhabitants of the farm Hoachanas, and purport to deal with the position of the residents of the said farm up to 1958. The gist of the charges in these extracts is:

(a) that, despite numerous requests by the inhabitants to the Administration to improve the water supply on Hoachanas, and despite assurances given by the Administration, nothing had been done; on the contrary, existing agricultural lands had been reduced; and

(b) that the inhabitants were to be removed from Hoachanas, and their land alienated, solely for the benefit of the "European settler

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[1] *Vide* Book III, Chap. I, para. 31, of this Counter-Memorial.

[2] Departmental information.

[3] Köhler O., *A Study of Gobabis District (South West Africa)*, Ethnological Publications, No. 42 (1959), para. 236, p. 70.

[4] I, pp. 168-169.

community", and that the new area allocated to them, viz., Itzawisis, was "useless land".

11. The farm Hoachanas, 14,253 ha. in extent, is inhabited by a number of Red Nation Nama and some other Natives.

In order to understand the petitioners' contentions, a short history of Hoachanas is necessary.

In August 1901, the German Colonial Office authorized the creation of a reserve of not more than 50,000 ha., in and around Hoachanas, for the Red Nation Nama. Although demarcated during 1903, the proposed reserve was apparently never proclaimed as such. This may have been due to the outbreak of the Herero-Nama rebellion in 1904, during which the Red Nation Nama also rose against the German Government.

On 26 December 1905, an Imperial Ordinance providing for the expropriation of Native properties in South West Africa was enacted. By virtue of powers vested in him by this Ordinance, the German Governor issued a Notice on 8 May 1907 confiscating, *inter alia*, the property, movable and immovable, of the Red Nation Nama of Hoachanas [1].

The German authorities thereupon proceeded to dispose of portions of the area originally demarcated for the proposed reserve.

The farm Hoachanas was thus German property which, save for the portions disposed of by the Germans as aforestated, accrued to Respondent in its capacity as Mandatory at the inception of the Mandate.

12. A small number of the Red Nation Nama who had not taken part in the rebellion were allowed by the German Administration to remain on Hoachanas and to graze their stock on the farm on payment of grazing fees. These Nama were still on the farm when Respondent assumed control of the Territory.

During the first few years of the Mandate, Respondent treated Hoachanas as a temporary reserve for its inhabitants. The Native Reserve Commission of 1921, appointed to investigate and report, *inter alia*, on the setting aside of land for the Native population of the Territory, recommended the creation of Native reserves and, at the same time, recommended the closure of certain small temporary reserves, including Hoachanas. The Commission suggested that land at Tses should be made available for the then residents of Hoachanas [2]. Because of practical difficulties at the time, this suggestion could not be carried out.

13. Although the Red Nation Nama who had occupied the farm during the last years of the German regime had been granted only temporary occupation and grazing rights, the Administration at different times promised the said occupants that they could remain on the farm and exercise such rights for the rest of their lives. The Administration has consistently honoured these promises.

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[1] *Vide Die deutsche Kölonial-Gesetzgebung*, Sammlung der auf die deutschen Schutzgebiete bezüglichen Gesetze, Verordnungen, Erlasse und internazionalen Vereinbarungen mit Anmerkungen, Sachregister, Elfter Band (Jahrgang 1907), pp. 233-234. This notice was confirmed by a subsequent notice dated 11 Sep. 1907. *Vide Deutsches Kolonialblatt:* Amtsblatt für die Schutzgebiete in Afrika und in der Südsee, XVIII Jahrgang, No. 20 (15 Oktober 1907), p. 981.

[2] *Report of Native Reserves Commission* (S.W.A.), 8 June 1921 (unpublished), p. 22 and Annex B; also *Minutes of Meeting of the Native Reserves Commission for South West Africa: held at Windhoek on the 21st June, 1921* (unpublished), p. 5.

Save in the case of the small number of inhabitants to whom the above life rights were promised, occupation of Hoachanas has at all times been permitted only on a temporary basis. This arrangement was, however, an unsatisfactory one, inasmuch as the farm, not being a proclaimed reserve, could not be developed properly. No trust fund, from which improvements could be financed, could be created under the provisions of the Native Reserves Trust Funds Proclamation No. 9 of 1924 (S.W.A.) [1] As an interim measure it was arranged that the fees which residents paid for the right to graze their stock on the land would be utilized for limited improvements. The expenditure incurred on improving the water supply was met in this way, as well as the cost of tools and food for those engaged on minor improvements, such as the building of small dams.

14. In 1956 the Administration decided that positive steps should be taken to end the temporary arrangement described above, and to provide the inhabitants of Hoachanas with a permanent home. A committee was appointed to investigate the matter of acquisition of land for this purpose. This committee inspected and commented favourably on the farm Itzawisis. The said farm is larger than Hoachanas, and adjoins the Nama reserve Berseba, as well as the Tses reserve, where a number of Nama are resident. It is close to two railway sidings, and medical services are more readily available, than at Hoachanas. A dam had been built and a borehole, yielding a good water supply, had been equipped with the necessary plant. The committee recommended that additional dams should be built and boreholes drilled to provide for future needs. The grazing was good, especially for small stock [2].

15. Sixty-four of the residents on Hoachanas accepted the offer to move to Itzawisis, and did so voluntarily at the end of 1956. The majority, however, under the leadership of Markus Kooper [3] and others, refused to move, maintaining that they were entitled to an area of 50,000 ha. in and around the farm Hoachanas, and that the Administration intended depriving them of *their land*. They claimed restoration of 36,000 ha. of land of which, according to their allegations, they had previously been deprived by the South West African Administration, and added certain other claims. The Administration, on the other hand, recognized only the enjoyment of life rights granted to the original occupiers who had received grazing privileges during the German regime, and maintained that the remainder had no legal right to remain on Hoachanas. A test case was brought in the High Court of South West Africa against Markus Kooper, the Administration praying for a declaration that Hoachanas was government land, and for an ejectment order against Markus Kooper.

On 21 July 1958 the High Court gave judgment to the effect that Hoachanas was government land, and that Markus Kooper was an unlawful resident at Hoachanas. In reaction to this judgment petitioners Dausab and Kooper alleged that the High Court had given a prejudiced decision, based on perverted facts.

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[1] *Proc.* No. 9 of 1924 (S.W.A.), in *The Laws of South West Africa*, Vol. II (1923-1927), pp. 179-181.

[2] *Vide* statement in *G.A., O.R., Fourteenth Sess., Fourth Comm.*, 915th Meeting, 19 Oct. 1959, paras. 17-18, pp. 168-169.

[3] The petitioner referred to in para. C.1 at I, p. 170.

Each and every one of the petitioners' allegations was incorrect, as well as the allegation in the extract quoted by Applicants, viz., that—

> "Because the 'Nation' has strengthened his hands Dr. Verwoerd, the minister of the Union Department of Native Affairs sent his secretary Dr. Eiselen to inform the officers of the SWA's administration to effect our removal from Hoachanas [1]."

The decision to propose the removal of the inhabitants of Hoachanas was made by the South West African Administration, although the Minister of Native Affairs was consulted and acquiesced in the proposed action, which, as has been shown, had been suggested by the 1921 Commission [2].

16. Respondent denies that the proposed removal was motivated by a desire to make room for "European settlement", and further denies that it had, or has, any intention of depriving the inhabitants of Hoachanas of land necessary for their present and future needs. Due primarily to its small size, Hoachanas was regarded as unsuitable for a Native Reserve. The proposed move to Itzawisis was motivated by a desire on the part of the Administration to provide the temporary inhabitants of Hoachanas with a permanent home, which could be properly developed, on land adjoining reserves permanently occupied by fellow Nama. It must be noted that, although the small number to whom life rights of grazing on Hoachanas had been granted, were, in the interests of the whole group, exhorted to move with the others, no attempt was ever made or contemplated to move them against their will.

17. Respondent denies the allegation that it has "reduced" any "agricultural lands" of the farm Hoachanas, and further denies the allegation by the petitioners that Itzawisis was "useless land which is just good for the purpose of grave yard" [1]. At the time when the move to Itzawisis was proposed, the grazing and the prospects of augmenting the water supply were good. All the efforts subsequently made to improve the water supplies were, however, disappointing, and a most severe and prolonged period of drought followed. It was found that in severe drought conditions the water supplies on Itzawisis would be insufficient for the purpose of sustaining all the inhabitants of Hoachanas. The Administration has therefore decided to defer the removal of illegal residents on Hoachanas until satisfactory water supplies, sufficient also during severe periods of drought, have been developed at Itzawisis, or until other arrangements have been made to provide the inhabitants of Hoachanas with an area for their permanent occupation.

Paragraph B.4: Extract from a Communication Dated 27 November 1957, from Hosea Kutako to the Secretary-General of the United Nations [1]

18. The following allegations are made by Headman Hosea Kutako in this extract:

(a) that he and his followers were removed from *their lands* to the present Native reserves to make room for European settlement;

(b) that the said removal was effected by force, and that the Govern-

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[1] I, p. 169.

[2] *Vide* para. 12, *supra*.

ment burnt down their houses and cut off the water supply, rendering the people homeless;

(c) that the "average person" (apparently intended to denote an adult male as head of a family) in a reserve possesses 15 head of cattle and about 20 goats with which he has to maintain a family; and that he is not allowed to have more than three oxen;

(d) that cultivation of crops for human consumption is practically non-existent, and that the Government does not allow the water in the reserves to be used for irrigation purposes;

(e) that the inhabitants live on milk only, but that even this is not sufficient to maintain a family because cream has to be sold to obtain money with which to buy clothing;

(f) that water is so scarce in the reserves that many people live six to seven miles away from the water, which they have to transport, and which is sometimes muddy and undrinkable [1].

19. Respondent denies that the Herero were removed to the present Native reserves from land which belonged to them. Amongst the consequences of the 1904-1907 rebellion was the confiscation of all Herero property north of the Tropic of Capricorn [2]. They were further prohibited from keeping large stock. At the inception of the Mandate the Herero therefore had no lands of their own, and it was entirely to their advantage that they were reassembled and given new homes in reserves set aside for them.

20. Respondent denies that the removal of the Herero to the reserves set aside for them was accomplished by force. Respondent further denies that their water supplies were cut off, or that their houses were burnt down in order to effect such removal. On one occasion a firm warning of forcible expulsion was necessary in respect of a few dissentients amongst a group that had been housed temporarily on a farm called Okatumba, which was not a Native reserve; but the warning served its purpose, and actual force was not required. The group was first accommodated on Okatumba in 1916. In 1924 they were required to move to the Epukiro Reserve, which had meanwhile been opened up for them. They had previously, at Respondent's invitation, inspected Epukiro and had expressed complete satisfaction. When the time for moving came, the majority complied without difficulty, but a dissentient minority of 108 remained, raising a complaint about the opening up of water at Epukiro. Upon being satisfied that the excuse was not genuine, the Administrator caused the aforesaid warning to be issued. A full account of the incident was given in Respondent's annual report to the Council of the League in 1924 [3].

21. The allegations by Headman Hosea Kutako as to the number of livestock owned by Natives at the time when his petition was drafted, are grossly incorrect. It is not certain whether the alleged figures refer to the stock in all the Native reserves in the Police Zone, or whether the figures refer to the Aminuis Reserve alone, as the words "in the reserve" (singular) are used, whilst the petition as a whole purports to

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[1] I, p. 169.

[2] *Vide* para. 11, *supra*, and Book VI, Chap. III, para. 27, of this Counter-Memorial.

[3] *U.G.* 33—1925, pp. 20-21.

deal generally with conditions in reserves in the Police Zone. If the average figures were intended to portray the position in all the reserves within the Police Zone, the correct position at the time when Headman Kutako's petition was drafted (in 1957) was as follows: The 6,513 families living in the Native reserves in the Police Zone (total population then approximately 28,000) owned 201,564 head of cattle and 379,379 small stock—i.e., about 31 head of cattle and 57 head of small stock per family. Apart from a substantial number of stock sold out of hand, the organized stock sales in the reserves yielded R454,866 (£227,433) during 1956 and R500,036 (£250,018) during 1957. The sale of cream by the inhabitants of the reserves yielded R88,984 (£44,492) during the financial year 1956-1957 [1].

If the figures given by Headman Kutako were, however, intended to relate to the position within the Aminuis Reserve only, they were also grossly incorrect. During 1956 there were 30,618 head of large stock and 1,678 head of small stock, owned by approximately 700 stock owners within the Reserve, which then had a total population of approximately 2,800—i.e., 44 head of large stock and 2 head of small stock per owner. The number of large stock increased to 37,430 in 1959, and to 47,048 in 1963. The number of small stock in 1959 and 1962 were 10,490 and 25,367. During the first half of 1963 two organized stock sales in the reserve yielded R100,591 (£50,295 10s.).

22. With regard to the alleged restriction on the number of oxen allowed, the position is as follows: The government notices relevant to the preservation of soil and the control of stock in reserves contain no provisions which restrict the number of oxen which a stock-owner may own or keep in a reserve. The regulations promulgated by Government Notice No. 68 of 1924 (S.W.A.) [2] provide that a stock-owner may not, without the Administrator's permission, keep more than 100 head of large stock and 300 head of small stock in a reserve. These restrictions were introduced to protect the interests of all stock-owners in reserves. Without such a measure of control overstocking would become a serious problem, and the interests of the smaller stock-owners could be subjected to those of the richer ones.

23. With regard to the allegation that "the people live on milk only" [3], Respondent states that the Herero people have traditionally and always lived on a diet consisting principally of milk. And, as to the statement ". . . even the milk is not sufficient to maintain a family because they have to sell cream to get money with which to buy clothing" [3], the suggestion of starvation due to an insufficiency of milk is unfounded. The stock figures and income statistics quoted above are self-explanatory. Quite apart from income derived from the sale of stock and cream, many inhabitants of the reserves also derive income from wages as employees outside the reserves.

24. Regarding the allegation concerning water supplies and the cultivation of crops, Respondent states that in most of the reserves in the Police Zone, as on most farms, the water supply is a paramount problem.

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[1] Departmental information.

[2] *G.N.* No. 68 of 1924 (S.W.A.), Schedule, in *The Laws of South West Africa 1924*, pp. 62-63.

[3] **I**, p. 169.

Water supplies are obtained mainly from underground sources and are generally only sufficient to meet essential needs, that is, for human and animal consumption. There are no restrictions on the use of water for irrigation purposes where the supply of water permits of such use. In view of the fact that a shortage of water is the overriding problem in connection with farming in the Police Zone, great efforts have been made by Respondent to increase water supplies in the Native reserves, and to have facilities distributed evenly so as to eliminate undue concentrations of the population.

Normally no reason exists why people should walk six to seven miles to fetch water, as is alleged. There is nothing to prevent the residents of reserves from residing or establishing their homes in close proximity to water supplies. Nor is there any reason why, with proper use of existing facilities, water should be muddy or undrinkable.

Paragraph B.5: Extract from a Communication Dated 13 June 1957 from Nghuwo Jepongo to the Secretary-General of the United Nations [1]

25. The following allegations are contained in this extract:

(a) conditions of life for Ovambo Native labourers in South West Africa are scandalous;

(b) there is a system of forced labour, the majority of S.W.A.N.L.A. recruits being forced to take up employment where they do not wish to, and they eventually sneak away.

26. In the absence of specific allegations explaining in which way conditions of life are alleged to be scandalous, Respondent is not in a position to deal specifically with the charge made.

Respondent notes, however, that the petition from which only the above extract is quoted by Applicants, contains a number of statements regarding the alleged conditions of life of Ovambo workers, which statements Applicants—presumably because they themselves can attach no credence thereto—have chosen not to include in their charges. So, for example, the petitioner refers to an alleged indiscriminate and wholesale murder of Ovambo workers in the following terms:

> "The Ovambo farm boys were decreased by their farm employers by shootings. Some Ovambo victims were forced to dig their own graves; many of Ovambo corpses were burned to ashes by farmers and thus were concealed; Ovambo corpses were thrown in deep dry wells; some Ovambo corpses were hidden under big heaps of cattle manures. Few farmers accused of murders were fined fifteen (£15) pounds only by Court. This above mentioned amount is often part of an Ovambo victim's sacked monies (savings) [2]."

Respondent submits that no credence can be attached to a general allegation that "conditions of life are a scandal" by a petitioner biassed to such a degree that he is prepared to allege such gross falsehoods as the above.

27. With regard to the living and working conditions of Native employees in the Police Zone, Respondent refers to its reply to paragraphs 58 to 76 of Chapter V of the Memorials [3], and denies the allegation that

[1] I, p. 170.

[2] *G.A., O.R., Thirteenth Sess., Sup.* No. 12 (A/3906), pp. 59-60.

[3] *Vide* Book V, secs. B and C, of this Counter-Memorial.

"conditions of life for Ovambo Native labour in South West Africa are a scandal".

28. Respondent denies that any system of forced labour exists in the Territory. If recruits accept work with certain mining concerns, they forthwith enter into contracts with their prospective employers. In the case of other work, e.g., on farms or as domestic servants in urban areas, it is often impossible to specify the particular employer at the time when the prospective employee is recruited in Ovamboland. In such cases the recruits enter into preliminary agreements with the recruiting agency, New S.W.A.N.L.A., to accept work of an agreed type with employers to whom they may be allocated, at not less than a specified wage. Before leaving for Grootfontein, the nearest railhead to Ovamboland, the preliminary agreement is fully explained to the recruit by the Bantu Affairs Commissioner or his assistant, and any recruit who is dissatisfied with the type of work or with the wage offered, has every opportunity of refusing to take such work.

After arrival at Grootfontein, the recruits who have not already been contracted to specific employers, are allocated to employers. It is the policy to return a recruit to his previous employer if the recruit so desires. Contracts between the employees and the employers are then completed, if the former agree. The terms of the contracts are explained to the recruits, and all contracts are attested by the Bantu Affairs Commissioner or his assistant, who inquires from the employee whether he is satisfied with the agreement. The recruit has every opportunity of refusing to assent to the said contract.

29. With regard to the allegation that the majority of Ovambo recruits eventually "sneak away", Respondent says that only a small percentage of recruits leave their employers before the expiration of their contracts. So, e.g., out of a total [1] of 35,063 extra-territorial and northern Natives employed in the Police Zone on contract during 1959, 1,143 (i.e., approximately 3 per cent.) left their employment before the expiration of their contracts and without such contracts having been cancelled. The petitioner's allegation in this regard is a gross exaggeration.

Paragraph B.6: Extract from a Communication Dated 3 August 1957 from Mr. Toivo Herman Ja Toivo and Eighty Other Ovambo, to the Chairman of the Trusteeship Council [2]

30. This paragraph also deals with the system of labour recruitment, which was the subject of the preceding paragraph. With regard to the first sentence of the extract here in issue, Respondent denies that the contract system is "compulsory", as is alleged. Contracts are entered into voluntarily, as explained in paragraph 28 above.

31. With regard to the "demand" that every young man should be free to choose and serve his master as long as they understand each other, Respondent states that, as far as choice of employer is concerned,

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[1] The total of 35,063 included all extra-territorial and northern Natives in the Police Zone in 1959, i.e., including those previously employed whose contracts had been extended.

[2] I, p. 170.

a maximum effort is made by the recruiting organization to place a prospective employee in employment of his choice. It is in the interests also of the organization to do so. Recruits are not assigned to employers whom they do not wish to serve. All Native labour contracts must be in writing, and before a contract is concluded the name of the employer is disclosed to the prospective employee, and the terms of the contract are fully explained to him by the Bantu Affairs Commissioner or his assistant. Any recruit may refuse to enter into a contract.

32. As far as the duration of service is concerned, the special circumstances make it impossible to permit Natives an unfettered discretion. In the first place, they are allowed into the Police Zone only for a specified period, viz., the contract period, which may not exceed a maximum period, fixed in consultation with the northern tribal authorities. The initial contract period has at the request of the tribal authorities been fixed at one year. In the case of farm labour there is provision for an alternative 18 months contract, and all contracts may be extended by mutual consent for further periods of six months each up to a total of 24 months in the case of married, and 30 months in the case of single, men. In the second place, employers making use of contract labour of northern and extra-territorial Natives are obliged to provide the latter with free rail and bus facilities from the place of recruitment to the place of employment and, on the termination or cancellation of the contract, with similar facilities, free of charge, to the place of recruitment. Employers would not be prepared to undertake this responsibility if employees were allowed an unfettered discretion to terminate their contracts at will. Furthermore, the task of ensuring that all recruits are returned to their homes after expiry of the contract period, as demanded by their tribal authorities, would become impossible if employees were permitted to change their employment at will within their contract period. Adequate provision is, however, made for an employee to request a cancellation of his contract if the employer does not comply with the terms thereof, or in any way ill-treats the employee.

33. The "demand" that married women must be allowed to accompany their husbands to their place of employment and that unmarried women must be permitted to enter the Police Zone to look for work, conflicts with the policy of the tribal authorities in the northern areas. A matrilineal system is in operation in those territories, and the tribal authorities are particularly concerned that their women should remain in their homelands to prevent detribalization. Furthermore, by remaining at home, the women are able to carry on the traditional farming activities and to provide for their families during the absence of their husbands. Consequently, at the request of the northern tribal authorities, women are not permitted to accompany their husbands who take up employment in the Police Zone. For the same reason unmarried women are not permitted to seek employment in the Police Zone.

34. The "demands" of the petitioners are, in the circumstances, either based on incorrect facts, or otherwise represent a minority view which is in conflict with the specific policy of the tribal authorities in the northern areas.

Paragraph B.7: Extract from a Communication Dated 30 September 1958, from J. G. A. Diergaardt et al. to the United Nations [1]

35. The first allegation in the extract here in issue is that—

> "Although the railway and the Administration's roads run through a large part of our territory, all the jobs on the railway and the roads are reserved for the whites [1]."

The words "our territory" in the extract refer to the Rehoboth *Gebiet*. The charge is denied. Although particulars of employment of Rehoboth Basters on the roads or railways are not available, it is pointed out that more non-Europeans than Europeans are employed in both departments throughout the Territory. The 1963 employment figures, for example, are as follows:

	Roads	*Railways*
Europeans	952	3,228
Non-Europeans	1,550	5,237

There is no ground for contending that "all the jobs on the railway and the roads are reserved for the whites".

36. Respondent denies that industrial development in the Rehoboth *Gebiet* is in any way hampered or restricted, or that Respondent or the South West African Administration is unsympathetic towards industrial development within the *Gebiet*.

In 1935 an industrial school was established at Rehoboth. In spite of representations made to the Baster *Raad* to encourage support for the school, the attendance dropped to five pupils, and frequently to as low as two or three. The principal eventually resigned his post to take up more lucrative employment elsewhere, and, owing to lack of support, the Education Department was unable to reopen the school at the beginning of 1937 [2].

The inhabitants of the *Gebiet* are entirely free to initiate any industry which they wish. They are entitled to own and operate mines within the *Gebiet*. They are free to prospect in the *Gebiet*, whilst no Europeans from outside the *Gebiet* may prospect or carry on any mining operations therein without the consent of the Baster *Raad*. Despite encouragement, the inhabitants of the *Gebiet* have not yet shown the initiative necessary for the establishment of industries. Apart from the erection of a small shoe factory by Mr. H. C. Beukes, the only sign of initiative to establish industries was a decision of the Baster *Raad* in 1956 to set aside an area in the *Gebiet* for industrial development. No such area has yet been demarcated. Should any of the inhabitants attempt to open factories or erect industries within the *Gebiet*, they will receive the wholehearted support of the Administration.

37. Economic life in the Rehoboth *Gebiet* is based primarily on agriculture. Practically the whole of the *Gebiet* is equal to the best pastoral land in South West Africa, and the inhabitants are almost exclusively farmers. In the development of their agriculture, the inhabitants receive the full support of the Administration. Breeding stock can be obtained from the Administration's experimental farms; the full range of advisory facilities of the Agricultural Branch is at their disposal; they

[1] I, *p. 170.*

[2] *Vide U.G.* 31—1937, para. 219, p. 38 and *U.G.* 25—1938, para. 253, p. 42.

may obtain free technical help for the building of dams; the health of their stock is watched and guarded by Administration officials, and veterinary services are available.

Paragraph C.1: Extract from a Communication Dated 25 February 1959 from the Rev. Markus Kooper to the United Nations [1]

38. The petition here in issue emanates from the Rev. Markus Kooper formerly of Hoachanas, and refers in part to the position at Hoachanas which has been dealt with above [2].

The allegations contained in the extract from the petition appear to be the following:

(a) The franchise has been extended to Europeans of the age of 18, whilst it is denied to the Native population.

(b) Only the old non-White people who were adults during the German regime have a say in "the matters of the territory", and this is of no value while the Natives who were children during the German regime are regarded as "non-originals" and "strangers", and are refused "any voice in the country of their birth".

(c) The consequences of the policy as referred to under *(a)* and *(b)* above are, firstly, that it brings the Natives back to where they were more than a hundred years ago, and, secondly, that it weakens the power of the Natives whilst increasing the voting power of the Whites.

39. In reply to the allegation set out in *(a)* above, Respondent admits that the franchise has been granted to Europeans who are 18 years old. Respondent further admits that the participation of the Natives in the affairs of the Territory does not include the right of franchise as far as the election of representatives for the Legislative Assembly or for the South African Parliament is concerned. This matter is dealt with elsewhere in this Counter-Memorial [3] and need not be discussed here again.

40. Respondent does not fully understand the statements referred to in paragraph 38 *(b)* above. The allegation certainly cannot refer to any distinction made in the Territory as a whole between Natives who were adults during the German regime, on the one hand, and all other Natives, on the other. No such distinction exists. The allegation must have been intended by the Rev. Markus Kooper to refer to a unique situation which obtains only in Hoachanas. As an act of goodwill, officials of the Administration gave an undertaking to the inhabitants of Hoachanas who had been given grazing rights on that property during the German regime that they would, during their lifetime, be permitted to reside on Hoachanas and exercise grazing rights thereon [4].

During consultations with the inhabitants of Hoachanas concerning their proposed move to Itzawisis [5] one meeting was held specifically for the purpose of obtaining the views of those residents to whom the aforementioned undertaking had been given. The main object of the Chief Native Commissioner, who presided, was to endeavour to persuade this

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[1] I, pp. 170-171.
[2] *Vide* paras. 10-17, *supra*.
[3] *Vide* Book V, sec. E, of this Counter-Memorial.
[4] *Vide* para. 13, *supra*.
[5] *Vide* paras. 14-15, *supra*.

group of residents, whose life rights on the property were recognized, also to move, so that the community would not be split up—a few on Hoachanas, and the rest on Itzawisis. Consequently the views of only those residents were sought at that particular meeting. At other meetings, however, the younger members of the community, who were not entitled to such life rights, were allowed to participate in the discussions, and they took full advantage of the opportunity to do so. The reason for special consultation of the group to which the above undertaking had been given, was at all times obvious.

41. Respondent denies that the members of the indigenous population of the Territory, or any section thereof, are regarded as "non-originals" or "strangers", or that any voice in the country of their birth is refused them. The existing systems under which non-Whites participate in the government of their own people are described elsewhere in this Counter-Memorial [1], and need not be dealt with here again.

42. Respondent denies that its policies have set the indigenous population back to where they were a hundred years ago [2]. On the contrary, the facts set out in this Counter-Memorial show that there has been an orderly and continuous advance in the welfare of the indigenous population.

43. With regard to the final allegation, viz., "It also weakened our power while the voting powers of the whites are increased"[3], Respondent is uncertain to what the word "it" was intended to refer. If "it" was intended to refer to the extension of the franchise to 18-year old Europeans, Respondent denies that such extension operated to weaken the power of the non-Europeans. Under Respondent's system of government the "power" of the non-Europeans does not come into competition with the "voting powers" of the Europeans. The extension of the franchise to 18-year old Europeans has no effect on the participation of the non-Europeans in their own processes of government. If, however, the word "it" was intended to convey a notion of differentiation between inhabitants of the Territory who were adults during the German regime and the younger generation of indigenous inhabitants, Respondent's answer is that no such differentiation exists as far as participation in processes of government is concerned.

Paragraph C.2: Extract from a Communication Dated 14 September 1960 from Chief Hosea Kutako to the Secretary-General [3]

and

Paragraph C.3: Extract from a Communication Dated 2 September 1954 from Hosea Kutako et al. to the Secretary-General [3]

44. The allegations in these two extracts are, in essence, the following:

(a) the indigenous population is kept voteless;

(b) the indigenous population is not participating in the political development of the Territory, and has no representatives in the councils of State;

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[1] *Vide* Book V, sec. E, of this Counter-Memorial.

[2] *Vide* para. 38 *(c)*, *supra*.

[3] I, p. 171.

(c) the above measures are motivated by the desire that political rights must remain in the hands of the European minority; and

(d) the entire indigenous population is living in a state of poverty as a result of the loss of its lands and low wages.

45. The complaints set out in sub-paragraphs *(a)*, *(b)* and *(c)* above have been levelled against Respondent in practically identical terms in Chapter V of the Memorials. Respondent has dealt with these charges in its reply to Chapter V of the Memorials [1], and further discussion thereof is not necessary.

46. With regard to the allegation that "The entire indigenous population is living in a state of poverty as a result of the loss of their lands and low wages" [2], Respondent denies that the "entire" indigenous population is living in a state of poverty. Respondent has dealt with the economic position of the indigenous people in its reply to Chapter V of the Memorials [3], and respectfully refers the Court to what was there stated.

Respondent states that only a small percentage of the indigenous population exists in a state of relative poverty, but denies that those members of the indigenous population who do live in a state of poverty have been reduced to such position "as a result of the loss of their lands and low wages". No indigenous groups have lost land as a result of any act of Respondent. On the contrary, ever-increasing areas of land have been set aside for the sole use and occupation of the indigenous population, and positive measures have been adopted to prevent the alienation of such land, and to preserve it for the indigenous peoples.

Of the small percentage of the indigenous population who live in poverty, some are paupers because they are, through old age or infirmity, not in a position to work. Where such people in the Police Zone are not supported by relatives, they are provided with pauper rations by the Government. There are others who have reduced themselves to a state of poverty through indolence and unwillingness to work. Finally, severe and prolonged droughts have from time to time caused temporary emergency conditions leading to indigence. During such periods government feeding schemes have been put into operation. Respondent denies that its policies or administrative measures are in any way responsible for the measure of poverty existing amongst some inhabitants.

47. Inasmuch as the extract here in issue gives no particulars relating to the complaint of low wages, and since Applicants themselves do not complain of low wages in their Memorials, Respondent does not propose to deal with the petitioners' vague and general allegation in this regard, save to say that, to the best of Respondent's knowledge, wages in South West Africa compare favourably with those paid in other parts of Africa.

Paragraph C.4: Extract from a Communication Dated 20 June 1958 from Johannes Dausab et al. to the Secretary-General [4]

48. The allegations contained in this extract can be summarized as follows:

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[1] *Vide* Book V, sec. E, of this Counter-Memorial.

[2] I, p. 171.

[3] *Vide* Book V, secs. B and C, of this Counter-Memorial.

[4] I, pp. 171-172.

(a) the indigenous people of South West Africa have no voice or representation in the government of the Territory;
(b) they are helpless, voiceless, outcasts, and are severely oppressed;
(c) the offices of Chief Native Commissioner, Welfare Officer, and Location Superintendent serve no satisfactory purpose, and are "deadly offices" seen from the point of view of the indigenous population;
(d) if Europeans can be represented by Europeans in the government of the country, there is no reason why non-Europeans cannot represent their own people, and there is no justification for a European who has been elected to the governing bodies by European voters to represent non-Europeans who had no part in his election.

49. Regarding the allegations set forth in sub-paragraphs *(a)* and *(d)* above, Respondent respectfully refers to its reply to similar allegations by the Applicants in Chapter V of the Memorials [1].

50. Respondent does not propose to deal with the vague and general allegations as set forth in sub-paragraph *(b)* of paragraph 48 above. They are baseless, and are denied.

51. With regard to the allegation set out in paragraph 48 *(c)* above, Respondent states that the offices referred to by the petitioners were created and are maintained for the specific purpose of serving the best interests of the indigenous population. The progress of the indigenous population has to no small degree been facilitated by the efforts of the Chief Native Commissioner, the Welfare Officers and Location Superintendents. On the whole the relations between these officials and the groups served by them are of the most cordial, and the fact that the petitioners in this instance speak otherwise, indicates that they are either voicing a minority view or acting in bad faith, with ulterior political motives. The Applicants' allegations are denied.

Paragraph C.5: Extract from a Communication Dated 16 July 1956 from Jacobus Beukes to the Secretary of the Committee on South West Africa [2]

and

Paragraph C.6: Extract from a Communication Dated 30 September 1958 from J. G. A. Diergaardt et al. to the United Nations [2]

52. The allegations contained in these two paragraphs refer to the Rehoboth Baster community. The petitioners' complaints concern the system of government of the said community through an advisory board. This system is alleged to depart from the "patriarchal law and fundamental principles" of the community, which may, so it is feared, jeopardize the community's future existence and "right of self-determination".

53. Respondent states that a brief review of the history of the Rehoboth community will clearly show that Respondent has consistently attempted to obtain the co-operation of the Rehoboth community with a view to their assuming a greater share in the administration of their own affairs.

[1] *Vide* Book V, sec. E, of this Counter-Memorial.
[2] I, p. 172.

54. The members of the Rehoboth community are known as "Rehoboth Basters", who regard themselves as a separate race. As stated elsewhere in this Counter-Memorial [1], they settled at Rehoboth in 1870. They had their own system of government, of which the chief features were a *Volksraad* (Parliament) and a *Kaptein* (Captain) [1]. In 1906 the Germans abolished the office of *Kaptein* and replaced the Baster parliament with a council of nine *burghers* (citizens), whose election was subject to the approval of the German governor [2]. The German magistrate at Rehoboth acted as chairman of the council, except when purely domestic matters were under discussion [2]. The Germans made laws for the *Gebiet* so that, in practice, the Basters lost their former rights of self-government.

55. After the Mandate had come into existence, the Administrator of South West Africa, acting on behalf of the Union Government, commenced negotiations with the Rehoboth Basters which, in 1923, culminated in an Agreement between Respondent and the elected *Raad* of the community, on behalf of the Basters [3].

In terms of the Agreement the South African Government acknowledge the right and title of the Rehoboth community to the Rehoboth *Gebiet*, and granted to the community the right of local self-government according to the laws of the community, and subject to the provisions of the Agreement itself. It was agreed that certain laws of South West Africa would be applied to the *Gebiet* and that the Administrator would have the right to apply other laws from time to time, after consultation with the *Raad* of the community. In the event of a dispute between the Administrator and the *Raad* in relation to any matter arising from the Agreement, the *Raad* would have the right to petition the South African Parliament itself [4].

56. Soon after the conclusion of the Agreement it became evident that the majority of the *Burghers* were dissatisfied, demanding nothing less than full independence for the *Gebiet*. The result was a state of near chaos, and in December 1924 the Administrator was forced to intervene. He suspended the powers, functions and duties of the *Kaptein* (Captain), *Volksraad* (Parliament), judges and magistrates of the community, vesting them in the magistrate of Rehoboth, who was to exercise such powers, functions and duties in accordance with the laws of the community then in force, and in conformity with the provisions of the Agreement of 1923. It was hoped that by this action law and order would be restored in the *Gebiet*. Unrest continued, however, and in April 1925 the Administrator was forced to declare martial law to avert imminent civil war. In contravention of martial law a number of Basters and Herero took up arms, with the result that troops were despatched to Rehoboth. The insurgents surrendered without a shot being fired. A number of insurgents were arrested and charged, but those who were convicted were almost immediately thereafter released under an amnesty proclaimed by Proclamation No. 11 of 1925 (S.W.A.) [5].

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[1] *Vide* Book III, Chap. III, para. 88, of this Counter-Memorial.

[2] *Ibid.*, para. 89.

[3] The Agreement was proclaimed and ratified by *Proc.* No. 28 of 1923 (S.W.A.), in *The Laws of South West Africa*, Vol. II (1923-1927), pp. 144-153, *vide* also *U.G.* 41—1926, pp. 100-107.

[4] This right has never been exercised.

[5] In *The Laws of South West Africa 1925*, pp. 45-47.

57. In 1928 an Advisory Board of six Baster members was constituted to advise the magistrate of Rehoboth in his administration of the affairs of the *Gebiet* [1]. Three members of the Board were elected by the *Burghers* of Rehoboth, and three were nominated by the Administrator. Since 1935 all six members of the Board have been elected by the *Burghers* of Rehoboth.

The Board, although *de jure* purely an advisory body, plays an important role in the administration of the *Gebiet*. Even the petitioner Mr. Jacobus Beukes [2] commented as follows on the Board's function on another occasion: "... whatever the Council (Advisory Board) decides, whether good or bad, is final [3]."

In practice the Board virtually exercises full self-governing powers in all internal affairs, subject only to the laws of the land that have been applied to the *Gebiet*. The function of the magistrate, in practice, is to guide the Board as far as he is able.

58. In view of the role which the Board in fact plays in the administration of the *Gebiet*, extended powers of local self-government for the Rehoboth community have been under consideration for a number of years. Inasmuch as requests had from time to time been made by different Advisory Boards for the restoration of the 1923 Agreement, it was decided by Respondent that, as a first step towards the grant of increased powers of self-government, the Agreement of 1923 should be restored to its original field of application. It must be noted that although certain provisions of the Agreement were suspended by Proclamation No. 31 of 1924 (S.W.A.) [4], the Agreement itself was never cancelled. Most of its provisions are still in force.

59. On 13 May 1961 the Administrator informed the Board that the Agreement of 1923 could be restored, if the Community so desired, and that thereafter there would be no objection to an amendment of the Agreement. The assurance was further given that the Administration would continue to assist the community in all spheres.

The Board decided that the *burghers* of Rehoboth should be requested to make their own decisions about the Agreement. It was thereupon decided that the magistrate, together with the members of the Board, would conduct a series of meetings throughout the *Gebiet* to explain the whole situation to the *burghers*. Fifteen meetings were thereafter held, during which it transpired that the majority of the *burghers* regarded restoration of the 1923 Agreement with a measure of suspicion, preferring to postpone the matter to draft a new agreement. The *burghers* were specifically informed that the choice was entirely their own: if they chose restoration of the 1923 Agreement, it would be regarded as a great step in the direction of further development; on the other hand, if they rejected the proposal for restoration of the 1923 Agreement, they could approach the Administration with alternative suggestions. On 10 June 1961 the community, by an overwhelming vote, rejected the

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[1] *Proc.* No. 9 of 1928 (S.W.A.), in *The Laws of South West Africa 1928*, pp. 38-52.

[2] Whose petition is the first of the two here under consideration.

[3] Statement dated 26 Mar. 1957, in *G.A., O.R., Twelfth Sess., Sup.* No. 12 (A/3626), p. 42.

[4] *Proc.* No. 31 of 1924 (S.W.A.), in *The Laws of South West Africa*, Vol. II (1923-1927), pp. 187-191.

proposed restoration of the 1923 Agreement, whereupon the Board expressed a desire to enter into negotiations for the drafting of a new agreement.

In September 1961 the Board was invited to submit proposals for a new constitution for the *Gebiet*. All reasonable facilities and assistance in the drafting of a new agreement regarding the form of future government for the *Gebiet* were offered, and have in fact been made available to the Board. After continued meetings and postponements of discussions, the Rehoboth community have not yet come to a final decision as to the form which they desire their future government to take.

Pending a final decision on the part of the Rehoboth community as to their proposals for new constitutional development, the *status quo* must of necessity be maintained.

60. In regard to the allegation that the Magistrate (Captain) of Rehoboth told the Board that he was " 'alone' entitled to make decisions in matters concerning Rehoboth and that the Advisory Board was there merely for the purpose of advising him" [1], Respondent says that at the said meeting the Magistrate explained the legal position as dealt with in paragraph 57 above, viz., that the Board was *de jure* purely an advisory body, but that in practice every consideration was given to the wishes of the Board.

Paragraph D.1: Extract from a Communication Dated 20 June 1958 from Johannes Dausab et al. to the Secretary-General [2]

61. The all-embracing and sweeping complaints contained in this extract show an extreme measure of bias on the part of the petitioners. The first allegation in essence amounts to a charge that the White people of South West Africa have deprived the non-Whites of practically all rights and advantages, including their "right of citizenship", their money, their education and their land. In the result, it is alleged, the non-Whites of South West Africa are strangers in the land of their birth, with no land of their own, without money, without education, without aid, without a roof to cover them, without road motor services, without railroads, without telegraphs, without advantages of any sort. It is further said that courts of justice are merely "presumed" to exist. Finally, the petitioners allege that the Whites are making war upon the defenceless non-Whites, are seeking means to torture them, and that the petitioners could be killed in "this campaign".

62. Due to the lack of particularity in the petitioners' allegations, specific replies thereto are impossible. Respondent, however, denies the allegations individually and collectively. The non-Whites have suffered no deprivation of the rights mentioned by them. On the contrary, as indicated in this Counter-Memorial, there has been a consistent advance of the indigenous inhabitants in the material and social fields, directly attributable to Respondent's efforts to promote progress. The sweeping statement that the indigenous inhabitants enjoy no advantages is without any foundation. Their economic position, their educational facilities,

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[1] I, p. 172.
[2] *Ibid.*, pp. 172-173.

their living conditions, etc., have been dealt with in this Counter-Memorial. The allegation that they receive no advantage from railroads, road motor services and services rendered by the Department of Posts and Telegraphs, is equally without foundation.

63. The allegation that "courts of justice are presumed to exist" [1] suggests that the petitioners wish to convey the idea that courts of justice do not exist. If this is what the petitioners intend, then, again, the allegation is without substance. The courts of justice in the Territory are open to all inhabitants and, as regards integrity and quality, they are equal to the best in any country of the world.

64. Regarding the statement attributed to Mr. Allen, who was Chief Native Commissioner in 1956, Respondent denies that this statement has been correctly rendered. On the occasion in question Mr. Allen was addressing the people of Hoachanas and trying to persuade them to accept the Administration's offer of a permanent home elsewhere. He explained to them what the legal position was, viz., that their residence on Hoachanas was illegal, except for the small number who had been granted life rights [2], and that if they refused such offer, they could become wanderers without any fixed abode, unless they obtained permission to take up permanent residence elsewhere. The word "birds" was not used at all.

65. Respondent also denies the allegation that the Whites are making "war" upon the non-Whites in South West Africa, and the expectations expressed by the petitioners that they could be tortured or killed in a so-called "campaign" are, to their knowledge, and have indeed proved to be, ludicrous. No action has been taken against anybody by reason of petitions submitted to the United Nations. The authors of the petition here in issue are still residing on the farm Hoachanas.

Paragraph D.2: Extract from a Statement by Hosea Kutako and Others, Forwarded to the Chairman of the Committee on South West Africa by the Rev. Michael Scott in a Communication Dated 22 July 1958 [3]

66. The extract relied on by Applicants is part of a statement alleged to have been made by Hosea Kutako and certain others, and submitted to the Chairman of the Committee on South West Africa by the Rev. Michael Scott.

The complaints in the extract deal with the administration of urban residential areas for non-Whites. The first allegation is that the Windhoek and Okahandja locations were to be removed to other sites, and that the petitioners refused to be moved, contending that they would prefer the existing locations to be improved on their present sites rather than that the population should be removed further away from their work.

With regard to the Okahandja location, Respondent denies that there was any intention to move the location. It was replanned and rebuilt on part of the then existing site and adjoining land.

67. With regard to the old location at Windhoek, it is necessary to give a brief résumé of events.

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[1] I, p. 173.

[2] *Vide* paras. 13-15, *supra*.

[3] I, pp. 173-175.

After the Second World War the Native location at Windhoek was still much what it had been many years before, but its population had so increased that the area was badly overcrowded, and the conditions prevailing there, hygienic and otherwise, left much to be desired. In fact, the old location had been found unsatisfactory for a long time, and plans to improve or to remove it had been discussed repeatedly. It was felt that an attempt to improve the existing location would not be good enough, and that a completely new township with modern facilities should be planned. The considerations underlying this view were the following:

(a) The intention was to establish a model township, designed on modern lines, and providing for a respectable mode of life and healthy living conditions. The new houses were to be larger than those in the old location; they were to be built on larger plots, and the subdivision of plots, or building of more than one house on one plot, as had been the practice in the old location, was not to be allowed.

As far as space was concerned, replanning of a new township on the site of the old location was impossible. The old site would have accommodated only a quarter of the inhabitants after replanning, and the considerably larger area needed for the proper planning of the new township, with sufficient ground for wider streets, schools, playing fields, parks, etc., did not exist there. Furthermore, there would have been no possibility of satisfactory and economic future expansion of the township.

(b) A scheme of providing new housing for the Native inhabitants of the location would not have been feasible if the new houses had to be built one by one, as and when old huts were demolished. To make the most profitable use of labour and to keep costs as low as possible, mass production methods had to be used, as in common practice wherever subsidized housing schemes are undertaken. A large number of families would have been homeless for considerable periods if a new housing scheme were to have been undertaken on the site of the old location.

(c) The Native Advisory Board, the body representing the inhabitants of the location, were duly consulted, and there was no doubt that the majority of the location residents preferred the establishment of a new township. In 1955, for example, the Board presented to the Minister of Native Affairs an address in which he was asked to use his influence with the Municipal Council to expedite the removal to a new site.

In 1954 the Executive Committee decided to grant the Municipality of Windhoek a loan of R2,500,000 (£1,250,000) for the establishment of a new Native township.

68. The Municipal Council considered various sites for the new township, and after the site at Katutura had been chosen as the most suitable in all respects, the Native Advisory Board was again consulted, and it agreed to the site chosen.

It may be added, furthermore, that neither Hosea Kutako, nor any other spokesmen of the location residents, had at any time during which the matter was under consideration, and when a decision could still have been revoked, requested the authorities to build houses at the old site instead of erecting a new township.

With regard to the petitioners' statement "We have been refusing to be moved" [1], Respondent wishes to point out that up to the stage when the petition here in issue was submitted (July 1958), no spokesman of the location residents had informed the authorities that any Natives would refuse to move to the new township.

69. The remaining portion of the extract here in issue is concerned with the contents of regulations alleged to—". . . have been drawn up by the Government to control all the locations in the towns of South West Africa" [1].

In this regard Respondent states that at the stage when the said petition was submitted, no new regulations had been promulgated for the Katutura location (or for any other location in South West Africa). Proposed regulations for Katutura were submitted to the Native Advisory Board for their comment, and regulations applicable to the new township were subsequently promulgated by Government Notice No. 16 of 1962 (S.W.A.) [2].

These, or similar, regulations have not been promulgated for any other urban Native location in the Territory. The only other urban location where similar regulations have been promulgated, is at Walvis Bay [3], which does not form part of South West Africa.

70. As the Applicants' allegations relating to location regulations appear to be concerned with the Katutura township at Windhoek, Respondent will deal with the charges in relation to the regulations applicable to the said township.

The first allegation made in this regard is—"One regulation says that the whole area of the location must be fenced with only one gate leading to the town" [1].

No such regulation exists. More particularly, there is no provision that "the whole area of the location must be fenced", nor that there must be "only one gate leading to the town" [1]. In fact, at no time has Katutura been fenced in. It is, however, necessary to erect stock-proof fencing along certain stretches of the boundaries, for example, along a boundary which is contiguous to a highway, or along the boundaries of adjoining farms. Furthermore, there are no entrance gates to Katutura.

71. The next group of allegations is that whenever a person leaves or enters the location he or she must be searched by a policeman at the gate, and that in order to enter or leave the location a permit must be produced, which permit must specify reasons for leaving the location or entering it. These allegations are again unfounded. No inhabitant of, or visitor to, the location is searched on entry into or exit from the location. There are no police stationed at any entrance to the location. The police have no authority to issue permits, and such permits as may be required are issued at the Location Superintendent's office. No reasons for leaving the location, or entering it, need be specified in any permit From time to time a check is made to determine whether unauthorized persons are present in the location, and it is only on such occasions that

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[1] I, p. 173.

[2] *G.N.* No. 16 of 1962 (S.W.A.), in *Official Gazette Extraordinary of Souht West Africa* No. 2369 (1 Feb. 1962), pp. 54-103.

[3] *Vide G.N.* No. 243 of 1960 (S.W.A.), in *Official Gazette Extraordinary of South West Africa*, No. 2287 (14 Dec. 1960), pp. 1178-1227.

permits are required to be produced by persons who must, in terms of the regulations, be in possession of permits to reside in or to be within, the location.

Permission to reside in, or to be within, the location is as follows:

(a) *Residents*

There are five categories of residential permits, namely:

(i) *Residential permits* are issued to *heads of families* who wish to rent dwellings erected by the Municipal Council in the location, for occupation by themselves and their families [1].

(ii) *Site permits* are issued to *heads of families* who wish to erect their own dwellings on sites within the location [2].

(iii) *Residential Certificates* are issued to *heads of families* who wish to purchase the right of occupation of a dwelling belonging to the Council [3].

(iv) *Lodgers' permits* are issued to persons, other than holders of any of the abovementioned permits and their families, who have obtained suitable accommodation in the location. Lodgers' permits are not required by unmarried children (of a lodger) who reside with their parent(s) and are under 18 years of age [4].

(v) *Hostel permits* are issued to the inmates of a native hostel situated within the location [5].

(b) *Visitors*

Any person desiring to enter, to be or to remain in the location temporarily, is obliged to obtain a visitor's permit [6].

72. Further allegations in the extract are:

> "When the location is finished being built any person who wishes to go and stay there must make a written application to the Superintendent. All the people who are not so well-to-do will not be allowed to enter the location to reside there. They will be obliged to return to the Reserves or else to look for work on the white man's farms. Only those people will be allowed to reside in Windhoek location who have been there continuously for three years without absence for even one day [7]."

These allegations are also untrue. The housing scheme in the new Windhoek location provides for all income groups, and no restrictions on the right to obtain residence are based on the financial position of a person who wishes to hire a house or other accommodation in the location. In the case, however, where an applicant wishes to erect his own house or to purchase the right of occupation of a council dwelling, he must satisfy the Superintendent that he is financially able to do so [8]. There is

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[1] Reg. 21, *G.N.* No. 16 of 1962 (S.W.A.), in *Official Gazette Extraordinary of South West Africa*, No. 2369 (1 Feb. 1962), p. 61.

[2] *Ibid.*, Reg. 23, p. 62.

[3] *Ibid.*, Reg. 26, p. 65

[4] *Ibid.*, Reg. 31 (1), p. 71.

[5] *Ibid.*, Reg. 44, p. 76.

[6] *Ibid.*, Reg. 31 (11), p. 72. Such control of visitors is necessary to ensure that undesirable persons do not enter the locations.

[7] I, pp. 173-174.

[8] Reg. 22 (2) *(g)* and Reg. 26 (3) *(c)* read with the definition of the words "financially able" in Reg. 1; *G.N.* No. 16 of 1962 (S.W.A.), in *Official Gazette Extraordinary of South West Africa*, No. 2369 (1 Feb. 1962), pp. 62, 65 and 55.

no provision limiting the right of residence in the Katutura location to such people as have "been there continuously for three years without absence for even one day" [1].

73. It is correct that in the Katutura township at Windhoek ethnic grouping is maintained as far as is practicable. Such ethnic grouping is in accordance with the traditions of the indigenous population, and experience has shown that the vast majority of the non-White people prefer to live in an ethnically grouped community. So, for example, ethnic grouping developed in the old location at Windhoek as a result of personal choice of the inhabitants, and without the authorities in any way forcing it upon them. Experience has further shown that ethnic grouping within locations is an important factor in the elimination of group friction and that it facilitates constructive participation by the inhabitants in the administration of their townships.

There is, however, absolute freedom of movement between ethnic groups within a location, and the allegation: "When a person wishes to go from the Ovambo to the Herero section he must apply for a permit and state the purpose of his visit" [1] is without foundation.

74. With regard to the type and quality of the housing provided at Katutura, the petitioners complain about the size of houses, their planning, their amenities and methods of construction. They allege that the houses have only one door and two windows (one at the front and one at the back), that there are no doors between the rooms, that there are no kitchens or bathrooms, that the construction is dangerous since the houses are made of prefabricated bricks without cement being used, and that the distance between one house and another is 6 ft.

The true position is as follows: the minimum size of a plot in the Katutura township is 40 ft. by 70 ft. Different types of houses are erected, viz., four, three, and two-roomed houses, in accordance with National Housing Office plans and specifications. Each house has a kitchen as well as a latrine, equipped with a shower and waterborne sewerage. There are two doors (one at the front and one at the back) and a window for every room. The size of a four-roomed house is 24 ft. by 21 ft., and the minimum distance between any two houses is 16 ft. The houses are constructed according to scientific methods and all bricks are cemented in.

Failure to pay rent is, in terms of the regulations, an offence. Though theoretically possible, arrests are not made in practice for contraventions in this regard.

75. With regard to the right of occupation of such houses, the allegation is made that only a man, his wife, and minor children up to 18 years will be allowed to stay in such houses, while persons over 18 years of age must be housed in compounds [1]. These allegations are not entirely correct. The holder of a valid permit, together with his family, has the right to occupy a dwelling. "Family" is defined in section 1 of the Regulations as meaning:

> "*(a)* the wife and all unmarried children under the age of 18 years of such holders;
>
> *(b)* all unmarried or widowed daughters of the holder of such site or residential permit who reside with such holder, together with their children under the age of 18 years;

[1] I, p. 174.

(c) any parent or grandparent of such holder or of his wife who are dependent upon such holder as a result of old age, weakness or any other incapacity; and

(d) any other person who, in the opinion of the Superintendent, is *bona fide* dependent upon such holder [1]".

Children over the age of 18 years who do not fall within categories *(b)* or *(d)*, may still live with their parents, but then a lodger's fee must be paid and a lodger's permit obtained. Such children may also, if they so elect, stay in a hostel in the location on a hostel permit.

76. The petitioners further allege that "Anyone living in the location may not pay a visit out of the location for more than 30 days", and that "If those 30 days expire before he returns his house does not belong to him any more" [2]. This allegation is incorrect. As far as a residential permit relating to the hire of a house is concerned, the regulations provide that the holder shall not absent himself from the house or from the location for a period of more than one month without the written permission of the Superintendent. If the holder does absent himself for a longer period without such permission, his residential permit *may* (not must) be cancelled by the Superintendent by giving the holder one month's written notice [3].

77. A number of complaints are levelled against the regulations which control the building by residents of their own houses. The allegation is made that anyone who wishes to do so must be a man over 21 years of age [2]. This is not so. Where the applicant is under the age of 21, a site permit is issued in the name of this guardian for the period of his minority. It is further alleged that the applicant must have resided in Windhoek for three years without having resided anywhere else. This is not so. There are no such restrictions on the issue of site permits.

Another allegation is that the applicant must produce an architectural plan of the proposed building. This allegation is partially correct. The applicant must submit a properly drawn plan of the proposed dwelling, approved by the Council's engineer and medical officer of health [4], but the plan need not be drawn by an architect. If the applicant wishes to build a dwelling according to a standard plan of the housing scheme, such a plan is provided by the Council free of charge [5].

The allegation is further made that the applicant must get a health inspector and an engineer to survey the building plot. This is not correct. An allotted site is measured and demarcated by the Superintendent [6].

78. The petitioners further allege that:

> "When buying the materials the Superintendent will direct where these materials are to be bought. They may not be bought at the cheapest place [2]."

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[1] *G.N.* No. 16 of 1962 (S.W.A.), in *Official Gazette Extraordinary of South West Africa*, No. 2369 (1 Feb. 1962), p. 55.

[2] I, p. 174.

[3] Reg. 28 (1), *G.N.* No. 16 of 1962 (S.W.A.), in *Official Gazette Extraordinary of South West Africa*, No. 2369 (1 Feb. 1962), pp. 66-67.

[4] Reg. 22 (2) (i), *G.N.* No. 16 of 1962 (S.W.A.), in *Official Gazette Extraordinary of South West Africa*, No. 2369 (1 Feb. 1962), p. 62.

[5] *Ibid.*, Reg. 22 (3), p. 62.

[6] *Ibid.*, Reg. 23 (6), p. 63.

The first allegation is only partially correct, and the second allegation is incorrect. As the Council constructs a large number of houses at the same time, a substantial reduction in the price of materials is obtained from certain merchants. Substantial building loans are, on application, granted by the Council, and one of the conditions of such loans is that the Council may require that all building materials be obtained from a merchant, selected by the applicant from a list approved by the Council, or that the Council may itself supply such materials, at cost [1].

Where no building loan is required, the Superintendent will, in the interests of the applicant, normally suggest where materials may be purchased. He does not "direct" an applicant where to buy materials. It is in the interests of the inhabitants to be able to obtain building materials of good quality, either from the Council at cost, or from one of the approved merchants at the reduced prices negotiated by the Council.

79. The petitioners also allege:

> "The house must be built by a qualified builder and carpenter. The Superintendent will provide a Supervisor to overlook the work. This will be someone of his choice but he must be paid by the person building the house a sum equal to 5% of the total cost of the building. The value of the house must be not less than £250 [2]."

The correct position is that the construction of houses in the township must be undertaken by capable building workers approved by officials of the Council [3]. A supervision fee equal to 2 per cent. of the cost of the dwelling and outbuildings erected on the site is payable [3]. No dwelling, the estimated cost of which, together with that of the normal outbuildings, amounts to less than £100 (R200), may be erected in the township [4].

80. The following are further allegations:

> "When it is built only the house is yours not the plot on which it stands. Except for building a kitchen if a permit is granted nothing can be done on the land outside the house. The rent of this plot of land will be decided by the value of the house constructed on it. The house will belong to the person who built it for thirty years only [2]."

It is correct that inhabitants of the township do not obtain ownership of the lots on which they build. The position was the same in the old location at Windhoek. A residential certificate (for purchasing the right of occupation) or site permit (for erecting a house) confers on the holder the right of the sole use and occupation of the site and dwelling thereon for a period of 30 years [5]. At the expiration of this period, the holder may apply for an extension of the permit or certificate. Such extension (and further extensions) may each be for a period of 30 years.

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[1] Reg. 27 (3), *G.N.* No. 16 of 1962 (S.W.A.), in *Official Gazette Extraordinary of South West Africa*, No. 2369 (1 Feb. 1962), p. 66.

[2] I, p. 174.

[3] Reg. 25 (8), *G.N.* No. 16 of 1962 (S.W.A.), in *Official Gazette Extraordinary of South West Africa*, No. 2369 (1 Feb. 1962), p. 64.

[4] Reg. 25 (4), p. 64.

[5] Regs. 26 (4) and 23 (1) *(a)*, *G.N.* No. 16 of 1962 (S.W.A.), in *Official Gazette Extraordinary of South West Africa*, No. 2369 (1 Feb. 1962), pp. 65 and 62.

Residential sites and dwellings may be used only for residential purposes. In a garden on the site fruit, flowers and vegetables for domestic use only may be grown [1].

The allegation that the rent of a site will be decided by the value of the house constructed on it [2], is incorrect. The fees payable for a site permit are fixed at 19s. 6d. (R1.95) per month, irrespective of the value of the house erected thereon.

81. The concluding portion of the extract here in issue reads as follows:

> "We are afraid that the building of this location will bring new restrictions and oppression upon the people in the towns. For instance one of the regulations lays down that whenever more than five people are gathered together a Boardman must be fetched and asked to remain so that he may know what is being discussed [3]."

The fear here expressed is groundless. The regulation mentioned by the petitioners as an example, viz.—

> ". . . one of the regulations lays down that whenever more than five people are gathered together a Boardman must be fetched and asked to remain so that he may know what is being discussed [3]",

does not exist. The only regulation applicable to gatherings in the township provides that every person who proposes to convene or address a public meeting or an assembly of persons shall notify the Superintendent at least 48 hours before the intended meeting or assembly; and, that if there are reasonable grounds for believing that any such meeting or assembly in the location might provoke or tend to lead to a breach of the peace, the Superintendent may, subject to certain provisions, prohibit such meeting or assembly [4]. The above provisions, however, do not apply to any meeting or assembly for bona fide wedding, funeral, church, educational, sport, concert, or entertainment purposes, or for the arrangement of domestic affairs [5].

82. In view of the exaggerations contained in the extract dealt with in the preceding paragraphs, certain facts regarding the document from which they have been taken by Applicants may be of interest to the honourable Court. That document purported to be a statement by Hosea Kutako *et al.* which was forwarded to the Chairman of the committee on South West Africa as an enclosure to a communication, dated 22 July 1958, from the Rev. Michael Scott, who stated: "I am sending the statement to you direct as I am not sure whether you have received the original [6]."

However, the statement sent to the same Committee by Hosea Kutako *et al.*, dated 29 July 1958, differed totally from the contents of the statement forwarded by the Rev. Michael Scott (and relied on by Applicants)

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[1] Reg. 23 (3), p. 62.
[2] I, p. 174.
[3] *Ibid.*, p. 175.
[4] Regs. 11 (1) and 11 (3), *G.N.* No. 16 of 1962 (S.W.A.), in *Official Gazette Extraordinary of South West Africa*, No. 2369 (1 Feb. 1962), pp. 59-60, read with Proc. No. 56 of 1951 (S.W.A.), sec. 32 (2) *(r)*, in *The Laws of South West Africa 1951*, Vol. XXX, p. 160.
[5] Reg. 11 (4), p. 60.
[6] *G.A., O.R., Thirteenth Sess., Sup.* No. 12 (A/3906), p. 53.

as far as the alleged location regulations are concerned. The statement of 29 July 1958, though identical in practically all other respects to the statement forwarded on 22 July 1958, omitted the allegations relating to the location regulations here in issue, and substituted a new text in this regard, differing in all respects from the previous allegations [1].

It would accordingly appear as if Hosea Kutako *et al.* themselves abandoned the rather wild allegations made by, or ascribed to, them regarding the contents of the location regulations in the extract here in issue, which allegations are nevertheless still relied on by the Applicants.

Paragraph D.3: Extract from a Statement by Hosea Kutako et al. Referred to in Paragraph D.2 [2]

83. The first portion of this extract purports to be a statement by an unnamed person, which statement is intended to show the practical difficulties which would have confronted the said person's mother, resident in a reserve, if she had heard that he was ill and had wished to visit him during the illness in an urban area. The said person is unknown, and there is no information as to the town in which he was working at the time.

The author of the statement alleges that his mother would not have been able to enter the town without a special pass from the location Superintendent. This is not correct. There are no provisions prohibiting entry of Native females into proclaimed urban areas, and Native females may travel freely without a pass. *The author's mother could legally have proceeded from the reserve to the urban area without being in possession of any permit.* If, however, she had nevertheless, for reasons of her own, wished to have a pass or permit, the Welfare Officer in the reserve would have issued it to her. After entry into the urban area, she would have been entitled to remain there for a period of 72 hours without a permit [3]. If she had desired to remain in the urban area for longer than 72 hours, she would have experienced no difficulty in obtaining permission to remain in the urban area as a visitor during the period of her son's illness.

84. With regard to the allegations concerning restrictions on the movement of Natives within urban areas, the position has been fully dealt with elsewhere in this Counter-Memorial [4]. The allegation in the extract here in issue to the effect that people working in Windhoek must carry passes when travelling to trials, or to pay house rent, or to attend a burial, need therefore not be dealt with here.

85. The further allegation is made in this extract that: "If you are ill and are found in the location without a permit from your master or your doctor you are arrested [2]." It is not clear to Respondent what is intended to be conveyed by this allegation. If a Native is entitled to be within a location, he cannot be arrested, and the fact that he may be ill is irrelevant. If, on the other hand, he has unlawfully entered the location, he

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[1] *G.A., O.R., Thirteenth Sess., Sup.* No 12 (A/3906), pp. 53, 56-57.

[2] I, p. 175.

[3] *Proc.* No. 56 of 1951 (S.W.A.), sec. 10, in *The Laws of South West Africa 1951*, Vol. XXX, pp. 108-110, as substituted by *Ord.* No. 25 of 1954 (S.W.A.), sec. 3, in *The Laws of South West Africa 1954*, Vol. XXXIII, pp. 737-741.

[4] *Vide* Book VI, Chap. IV.

is liable to be arrested, but if he is ill, he will not be arrested. In such circumstances he will either be allowed to remain on a visitor's permit, or else be removed to a hospital, if necessary, to receive treatment.

86. The final allegation, viz., that pass carrying is becoming ever harder, is denied. The matter of passes is dealt with elsewhere in this Counter-Memorial [1], and it is not necessary to repeat what has been said there.

Paragraph *D.4*: *Extract from a Communication Dated 17 October 1957, from Mrs. Käthe von Löbenfelder, Outjo, to the Trusteeship Council* [2]

87. The allegations in this extract relate to an application by a certain Walter Willi Werner Peschel for a permit to enter South West Africa. In his application Mr. Peschel alleged that he was not subject to the Aliens Act No. 1 of 1937, as he had been born in the Territory in 1918. Before authorizing the issue of an entry permit, Respondent had to be satisfied that Mr. Peschel's allegation concerning his birth in the Territory was correct. According to Respondent's normal procedure in such matters, Mr. Peschel was requested to submit documentary proof of his birth within the Territory. Mr. Peschel was, at the time of his application, a married man with a wife and two children, living in Germany. In his application he described himself as a German national.

Mr. Peschel was unable to produce documentary proof of his birth in the Territory. Normally the submission of a birth certificate is required, but Mr. Peschel could not produce such a document, and on investigation Respondent found that there was no record of registration of his birth in the Territory. Mr. Peschel was also unable to produce any record of baptism in the Territory, or any other document tending to show his presence within South West Africa at the time of his birth, or at a youthful age.

88. On 2 February 1956 the petitioner, Käthe von Löbenfelder, signed a sworn deposition declaring, *inter alia*, that on 7 January 1918 she gave birth to an illegitimate son in the district of Keetmanshoop, South West Africa; that, to the best of her knowledge and belief, there was no person alive who had been present at the birth; that the birth of the said son was at no stage notified for registration, and that the said son was not baptized in South West Africa. She further declared that the father of the said son was a certain *Paschel*, that the said Paschel took the child to Germany in 1924, and that he had the said child baptized in Germany as "*Werner Paschel*" [3]. No deposition by the alleged father of the said illegitimate son was ever submitted, nor was any other documentary proof forthcoming which could substantiate that the applicant, Walter Willi Werner Peschel, had in fact been born in South West Africa.

As Respondent's immigration officials regarded the evidence submitted as insufficient to convince them that the applicant had in fact been born in South West Africa, his application for an entry permit, based on the allegation of his birth in the Territory, was not granted.

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[1] I, p. 175.
[2] *Ibid.*, pp. 175-176.
[3] A certified translation of the original deposition is filed with this Counter-Memorial

89. Respondent denies allegations of discrimination against the petitioner or against Mr. Peschel on the grounds of "apartheid", as is alleged [1]. In fact, the Administrator of the Territory personally endeavoured to assist the petitioner in obtaining an entry permit for the applicant, Mr. Peschel.

No satisfactory proof having been furnished of the applicant's alleged birth in the Territory, consideration was given to the possibility of allowing him to enter the Territory as an alien in terms of the Aliens Act, No. 1 of 1937 [2]. Pursuant to the Administrator's efforts, the petitioner, Käthe von Löbenfelder, was informed that the matter would receive further attention when it was known whether the applicant's wife and two children also intended applying for domicile in South West Africa, and what arrangements would be made to ensure a livelihood for the applicant upon his arrival. This information was essential to permit consideration of the matter because, although the petitioner states in the extract here in issue "Being ill and owning a farm I would like to bring my second son here to help me" [3], she was at no relevant time the owner of a farm. The true position was that she hired part of a farm at a rental of £25 per month, had less than 200 head of cattle, including calves, and could not always pay the rental. It was clear, therefore, that it would have been impossible for the applicant, his wife and two children to make a living on the said property. No reply was, however, received from the petitioner, and no further consideration could accordingly be given to the matter.

Paragraph D.5: Extract from a Communication Dated 30 August 1960 from Mr. S. Mifima, Chairman, South West Africa People's Organization, Cape Town, to the Committee on South West Africa

and

Paragraph D.6: Extract from a Communication Dated 3 August 1960 from South West Africa People's Organization, Windhoek, South West Africa, to the Committee on South West Africa [4]

90. The two extracts here in issue purport to deal with alleged deportations and banishments by Respondent of members of the indigenous population. A general allegation is made, without specific detail, to the effect that "people have been deported from place to place and banished from their areas to forests hundred of miles away from their families and friends", that they have no "means of making a livelihood", and that "there is no hope of seeing them any more" [1].

91. Respondent denies these allegations, and will reply in detail to the charges made in the two extracts with regard to specific persons. In general Respondent states that only foreigners can be deported to places outside the borders of the Territory. Native inhabitants of the northern areas who have entered the Police Zone without permission to

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[1] I, p. 176.
[2] In *The Laws of South West Africa 1937*, Vol. XVI, pp. 40-51.
[3] I, p. 175.
[4] *Ibid.*, pp. 176-177.

remain there, or whose contract periods have expired, can be returned to their homelands.

MR. LOUIS NELENGANI

92. The allegations made in this regard are incomplete and incorrect. Louis Nelengani, a Native born in Angola, and subject to the provisions of the Extra-territorial and Northern Natives Control Proclamation, No. 29 of 1935 [1], could in terms of such provisions only remain within the Police Zone while in possession of a proper indentification pass, or an exemption certificate. Furthermore, he could only remain within the proclaimed urban area of Windhoek if he was employed there and had permission to remain there. During July 1960 it came to the knowledge of the authorities that Louis Nelengani was unemployed, and had no permission to remain in the urban area. An exemption certificate previously issued to him was then cancelled. He was therefore advised that he had no right to remain in the urban area of Windhoek, and that, unless he returned to his place of domicile of his own accord, he would probably have to face a charge under Proclamation No. 29 of 1935 or under Proclamation No. 56 of 1951, and that, if convicted, he would probably be repatriated. The allegation in the extracts here in issue to the effect that he was deported to Ovamboland, is incorrect. Nelengani was not deported to Ovamboland, or anywhere else. Neither was he arrested, nor was any other action taken against him. After being advised that his presence within the proclaimed urban area of Windhoek was unlawful, Nelengani disappeared, and it was later ascertained that he had left the Territory and entered Bechuanaland. He has not returned since.

All allegations with regard to Louis Nelengani contained in the two extracts, including the annexure to the letter from which the second extract has been taken, which are inconsistent with the above statement by Respondent, are denied. Respondent further denies that any orders were ever issued by it with regard to action against Louis Nelengani. The allegations to this effect in paragraph D.6 are therefore denied.

MESSRS. J. KASHIKLIKU AND HERMAN JA TOIVO

93. In paragraph D.5 [2] it is alleged that the above two Natives were "kept under house arrest at the chief's kraal". Respondent is unaware of the identity of the person called J. Kashikliku. On 13 July 1960 a certain Jackson Kashikuka, an Ovambo who had entered Walvis Bay without permission to be, or to remain, within the Police Zone, or the proclaimed urban area, was returned to Ovamboland. Respondent is, however, unaware of any action taken against the said Jackson Kashikuka by the tribal authorities in Ovamboland. The tribal authorities in the northern Native reserves are vested, *inter alia*, with criminal jurisdiction, and have their own powers of arrest, detention and punishment. In the exercise of these powers the tribal authorities function

[1] *Proc.* No. 29 of 1935 (S.W.A.), in *The Laws of South West Africa 1935*, Vol. XIV, pp. 148-158.
[2] I, p. 176.

according to Native law and custom, and are not under the direct control of Respondent.

If any action was taken against Jackson Kashikuka, it must have been by the tribal authorities in Ovamboland.

As far as Herman Ja Toivo is concerned, Respondent is aware of the fact that for a few months Toivo was required to remain at Chief Johannes Kambonde's kraal, and was not allowed during that period to travel freely through Ovamboland. This restriction was placed on him by the tribal authorities of the Ndonga tribe of which he was a member, as he had held meetings throughout Ovamboland in defiance of the tribal authorities' decision that he should not do so. Action was thereupon taken against him under Native law and custom. Respondent denies that the South West African Administration or Respondent took the said action.

After a few months the restriction on Toivo's freedom of movement was withdrawn, and since that time he has freely continued his activities throughout Ovamboland.

Eliezer Noah and Tuhadeleni

94. The author of the extract quoted in paragraph D.5 [1], who wrote from Cape Town, implies that Eliezer Noah and Mr. Tuhadeleni are two different persons. This is not correct. The two names refer to one person, Eliezer Noah Tuhadeleni. Respondent is aware of the fact that on 14 June 1960 the said Tuhadeleni was arrested by the tribal authorities in his area because he had held meetings in Ovamboland in defiance of a prohibition by the said authorities. After a trial by the tribal authorities he was, as far as Respondent is aware, ordered to move away from his normal sphere of operations to the north-eastern portion of Ovamboland. From the beginning of 1961, however, Tuhadeleni was once more moving freely throughout Ovamboland and holding political meetings. Respondent denies that any action against Tuhadeleni was taken by it or by the South West African Administration.

Mr. Paroly

95. Respondent has been informed that no person with the name of Paroly was in the employ of Consolidated Diamond Mines, Oranjemund, during 1960. Nor, so Respondent has ascertained, was any employee of Consolidated Diamond Mines at any relevant time banished by Consolidated Diamond Mines officials from his fellow-workers. Respondent further denies that any action of the nature alleged was taken by it or the South West African Administration in respect of any employee of Consolidated Diamond Mines.

Paragraph E.1: Extract from the Statement cited in Paragraph D.2 [2]

96. Respondent has dealt with the education of Native children on European farms [3]. As shown, there are many difficulties in the way of

[1] I, p. 176.
[2] *Ibid.*, p. 178.
[3] *Vide* Vol. VII, Chap. V, paras. 12-13, of this Counter-Memorial.

providing them with an education, but steps have been, and are being, taken to bring about an improvement in the position, and it is hoped that the problem will in the course of time be solved.

Paragraph E.2: Extract from a Communication Dated 22 November 1957 from S. Shoombe and 100 other Ovambo to the Secretary-General of the United Nations [1]

97. Respondent has already dealt with the difficulties experienced in extending education in Ovamboland and in raising the standard of teaching in that area.

As previously shown, secondary education is now provided in Ovamboland, and since 1961 the minimum requirements for admission to teacher training schools in Ovamboland have been raised, thus bringing the position on a par with that obtaining in the Police Zone [2].

As to the statement regarding Chiefs and Headmen, the Applicants and the persons referred to fail to state that the Government appoints as Chiefs and Headmen such persons as are the traditional or selected leaders of their people. It may be true that some of the older men holding such positions are illiterate, but this merely serves to emphasize that the history of education in Ovamboland is but a short one. This is a situation which ought to be readily appreciated by all those who are conversant with the difficulties of extending modern education to the indigenous peoples of Africa. From evidence available it would seem that at least one of the Applicant States, Liberia, experienced similar difficulties in this regard [3].

The statement that Chiefs and Headmen receive presents from the Government is true, but such presents do *not* include liquor. Presents are given when government officials visit such Chiefs and Headmen, and the practice is a long-established one. The allegation that presents are given to bribe Chiefs and Headmen "to allow their young men to work as unskilled labourers for the Europeans" [1], is a gross falsehood. Small presents are given to Chiefs and Headmen in Ovamboland as tokens of the Government's friendship and respect, and in order to promote friendly relations between these men and the Government. The giving of such presents to Native Chiefs was, for many years, a common practice in many countries in Africa.

Paragraph E.3: Extract from a Communication Dated November 1953 from Miss Margery F. Perham to the Chairman of the Ad Hoc Committee on South West Africa [4]

98. Respondent does not dispute the educational qualifications of the late Mr. Himumuine as set out in the extract from the letter quoted in this paragraph. It is also admitted that he applied for a passport as is alleged, and that a passport was refused. Respondent considered then,

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[1] I, p. 178

[2] *Vide* Vol. VII, Chap. V, paras. 27 and 52, of this Counter-Memorial.

[3] *Ibid.*, para. 32 (vii).

[4] I, pp. 149-151.

as it still does now, that it would not be in the public interest to make known its reasons for the refusal of the passport, but it states positively that the passport was not refused in order to prevent Mr. Himumuine from furthering his studies, as seems to be the suggestion. The reason for the refusal was in no way connected with educational matters.

CHAPTER III

THE PETITIONERS

1. It has been stated elsewhere in this Counter-Memorial [1] that the present proceedings before this Court are part of a campaign designed to bring South West Africa into line with new governmental systems recently established elsewhere in Africa, and to achieve for the whole of the Territory majority rule by the Native population. This campaign originated in the spirit of African nationalism which has swept the African Continent in the post Second World War period. The campaign in respect of South West Africa has been encouraged and organized by sources outside the Territory. In fact, encouragement has reached a point of incitement to violence. So, e.g., petitioners at the United Nations Organization have been assured that all possible help would be given to them to *attain their political objectives, whatever methods they resorted to, including armed insurrection* [2].

2. The objectives of this campaign, as envisaged by certain of the petitioners, have been put bluntly by Mr. Mburumba Kerina, one of the prime movers in the campaign, who for many years has appeared as a petitioner at the United Nations [3] and has played a major part in suggesting action to his local associates in the Territory, including a number of the petitioners relied on by Applicants in Chapter VI of their Memorials.

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[1] *Vide* Book IV.

[2] *Vide*, for example, statement by Mr. Guellal (Algeria) before the Fourth Committee on 6 Nov. 1962 in *G.A., O.R., Seventeenth Sess., Fourth Comm.*, 1374th Meeting, 6 Nov. 1962, p. 294.

[3] Kerina, at one time also known as Getzen, appeared before the Fourth Committee as a petitioner at the following meetings over the period Dec. 1956 to Dec. 1961: 11th Session, 571st Meeting, 11 Dec. 1956, p. 107; 11th Session, 572nd Meeting, 11 Dec. 1956, pp. 111-114; 11th Session, 574th Meeting, 13 Dec. 1956, p. 119; 12th Session, 653rd Meeting, 26 Sep. 1957, p. 11; 12th Session, 654th Meeting, 26 Sep. 1957, p. 17; 12th Session, 655th Meeting, 27 Sep. 1957, pp. 19-23; 13th Session, 749th Meeting, 6 Oct. 1958, pp. 32-37; 13th Session, 750th Meeting, 7 Oct. 1958, p. 37; 13th Session, 751st Meeting, 7 Oct. 1958, p. 39; 13th Session, 754th Meeting, 9 Oct. 1958, p. 51; 13th Session, 755th Meeting, 9 Oct. 1958, p. 54; 14th Session, 904th Meeting, 12 Oct. 1959, p. 110; 14th Session, 908th Meeting, 14 Oct. 1959, p. 130; 14th Session, 909th Meeting, 14 Oct. 1959, pp. 135-136; 14th Session, 910th Meeting, 15 Oct. 1959, pp. 137-140; 14th Session, 911th Meeting, 15 Oct. 1959, p. 141; 14th Session, 913th Meeting, 16 Oct. 1959, p. 154; 14th Session, 1001st Meeting, 11 Dec. 1959, pp. 699-701; 15th Session, 1051st Meeting, 15 Nov. 1960, pp. 308-310; 15th Session, 1052nd Meeting, 15 Nov. 1960, p. 314; 15th Session, 1053rd Meeting, 16 Nov. 1960, pp. 317-318; 15th Session, 1054th Meeting, 16 Nov. 1960, pp. 322-324; 15th Session, 1055th Meeting, 17 Nov. 1960, pp. 325-327; 15th Session, 1056th Meeting, 17 Nov. 1960, p. 330; 15th Session, 1098th Meeting, 9 Mar. 1961, p. 5; 15th Session, 1100th Meeting, 10 Mar. 1961, p. 13; 16th Session, 1217th Meeting, 20 Nov. 1961, pp. 377-379; 16th Session, 1221st Meeting, 22 Nov. 1961. pp. 401-405; 16th Session, 1222nd Meeting, 23 Nov. 1961, p. 409; 16th Session, 1223rd Meeting, 24 Nov. 1961, pp. 414-417; 16th Session, 1241st Meeting, 7 Dec. 1961, p. 549.

In a letter dated 5 March 1959, sent by Kerina from New York to John Muundjwa in South West Africa, the aims of the said campaign were described as follows:

> "It is time for us to make our position clear to the White Settlers in South West Africa. *South West Africa is an African country and must be subject to the government of the Africans.* Let the Whites and the Coloureds in South West Africa stop deceiving themselves. Let them stop thinking that Africans are underdogs in the land of their birth and as such should not be considered as human beings. *Let the stupid Africans and Coloured agitators such as Kloppers, etc., etc., encouraged by deceptive White Settlers stop preaching multi-racial or partnership in South West Africa at the expense of the African people. We have had enough of these nonsense. Our position should be made clear to the Whites. We want South Africa back no more no less* . . .
>
> If we must have our freedom we must be strong and be well organized. The Whites in South West Africa are in constant fear because of what is happening in other parts of Africa. They know that South West Africa is next . . . Look at the Mau Mau today, they are represented in the Government and soon they will govern their own country. The strength of the few educated men in S.W.A. lies among those of our people we call *ignant masses* without their support no so-called educated men in S.W.A. will succeed . . . Join *Toivo Ja Toivo* in his struggle for our peoples freedom, . . .[1]" (Italics added.)

To another associate in the Territory, Toivo Ja Toivo[2] Kerina wrote as follows in a letter dated 9 February 1959: "Believe me South West Africa will become free by all means[3]." And, in a letter dated 14 February 1959: "Together we shall smash those Whites out of the Government without using force but our brains[4]."

On 16 September 1959, Kerina wrote to another associate, Sam Nujoma:

> "I plan to base my statement on the necessity of legal action and make a strong plea for an independent African State to take this case to the International Court of Justice for a compulsory judgment. . . . I shall send you more information as it becomes available and when it does reach you *please act forcefully and violently in the* positive sense of the word . . .
>
> Of course we inevitably have differences but at the moment *the immediate objective of ridding ourselves of the Boers is paramount*[5]." (Italics added.)

3. With regard to the methods by which the said campaign was, and is, conducted, certain lines of action in both the domestic and international spheres have been diligently pursued. Consistent efforts have been made to create internal dissatisfaction by organized incitement, but an even greater effort has been made to build up international pressure and

[1] *Kerina to Muundjwa*, 5 Mar. 1959. (Photostat copies of the letter quoted in this footnote and the letters quoted hereafter are filed with this Counter-Memorial.)

[2] The petitioner in extract B.6 at I, p. 170 and referred to as Herman Ja Toivo in extract D.5 at I, p. 176.

[3] *Kerina to Toivo Ja Toivo*, 9 Feb. 1959.

[4] *Ibid.*, 14 Feb. 1959.

[5] *Kerina to Sam Nujoma*, 16 Sep. 1959.

to seek international intervention. In the international sphere it was evidently considered that the efforts of petitioners at the United Nations Organization could only be successful if the world could be made to believe that the indigenous population of South West Africa was being subjected to ruthless suppression, and that atrocities against them were being perpetrated with impunity.

The contents of letters addressed by Kerina to his associates within the Territory indicate clearly the methods adopted to further their campaign. Extracts from these letters are set out below:

(a) *Letter to Toivo Ja Toivo, dated 14 February 1959:*

"Please Toivo, do this organize an *Ovamboland People's National Congress* make all the Chiefs of various tribes the Vice-Presidents. In other words make them First Vice-President, Second Vice-President, Third Vice-President, etc., etc., etc., this will break the inter tribal rivalry that may come about. Be the General-Secretary of the Congress. Be very shrewed. Work with the nominated Chiefs very carefully. Pretend as if you are with them. But also take into serious account the other promising young people and Elders and please make *Father Hamtumbangela* the President of the *Congress*. The first task of the Congress should be a petition to the Prime Minister of South Africa with copies to the Windhoek Advertiser, New Age, United Nations, Cape Times, and a copy to me, the American Committee on Africa, Africa Weekly, Rev. M. Scott [1], etc. This petition should ask *four* things. Of course a copy should be sent to the Chief Native Commissioner. These *four* things should be as follows: Ask for—

(a) Direct African and Coloured People representation in the Government of South West Africa.

(b) Introduction of *Universal Safrage* in South West Africa irrespective of Colour, Creed, Religion and National Origin.

(c) Immediate liquidation of South West Africa Representation in the Parliament of South Africa.

(d) Immediate placing of South West Africa under the United Nations Trusteeship System.

Toivo, I urge you not to accept part of these demands. Tell the Prime Minister of South Africa that you want all four to be granted and no compromise whatever. Please remember Toivo, *I will play this up here at the UNO.* But to make it effective, the Congress *should petition* the President of the United States Government and the Prime Minister of Russia for immediate *Military Action against South Africa collectively or individually to enforce the decisions and authority of the United Nations.* Boy this will make the British to even force South Africa at the UNO to place South West Africa under the Trusteeship because they are afraid of Russia. But *if you want me to draft this petitions please inform me,* because they have to be legal and specific and also non-commital on our part. I *can consult with some of my legal friends here.* A copy shall be sent to the UNO and other sources for a world wide publicity. This will take the Whites in South West Africa by complete surprise. However, remember one thing. By fear and surprise and desperation these

[1] The person referred to in para. D.2 at I, p. 173.

Whites will come to you to talk about the danger of communism if we invite Russia to take military action and the United States as well. Our answer to these Whites should be. We have for 13 years petitioned the UNO. We have repeatedly informed the Union of South Africa of our wishes, and our freedom. Instead the South African Government continue to remove us from our lands by force. Suppress us ruthlessly etc. Worry about communism in Europe, not in Africa. In Africa it will be first African Freedom, before we worry about communism. If communism has to help us in South West Africa to achieve this freedom. It is welcome. Our people have no ammunitions to fight against South African Policy and army. So if Russia and America can come to do the job for us. We invite them. Please Toivo digest these few points. They may sound less forcefull but that is just the point. They have power. *I shall play the ball here at the UNO.* I shall also suggest that representatives of the African people from South West Africa be invited to the UNO. At the UNO we shall stand together. Just tell our people in Ovamboland to keep together and not to say anything. *If those nominated Chiefs say a word tell our people to burn their places at night secretly of course.* Toivo, do not worry. I will build you up if you promise to keep my name alive before our people. There are 200,000 people in Ovamboland more than the rest of the territory. Fear not my friend. Kozongwizi is also working hard in the South, together we shall have more than 300,000 African people behind us. Together we shall smash those Whites out of the government without using force but our brains. Believe me Toivo, if we do not do this, our struggle will remain stagnant. We must do something if we have to be free. We have nothing to loose or to fear. All that we want is just strong men to tell the Whites in their faces what we think of them and what we want. You are one of those men and Kozongwizi is another one of our comrade. *Listen the two petitions to the big boys should be timed. They should reach them just a month before the UNO Assembly start so that the matter could become a world wide one* [1]." (Italics added.)

(b) *Letter to Toivo Ja Toivo, dated 21 April 1959:*

"Listen Toivo, Kozongwizi escaped from S.W.A. He is now in Ghana. We are trying to get him over to the U.S.A. to appear before the UNO. . . . In the meantime just keep quite, work very quietly, do not take part in any open political activities; those Boers are after you . . . Do not talk in public, talk behind the scenes. *Befriend those nominated Chiefs, pretend as if you like them.*

I am working hard on the 2 Big Boys petitions. I am sure we'll get them through . . . This year must bring our freedom or not at all . . . This Assembly will not pass without anything done. You would see as soon as those 2 Big Boys receive the petitions S.A. will be shocked [2]." (Italics added).

(c) *Letter to Kapuuo, dated 30 April 1959:*

"I am a little worried because no western country will ever do anything for us to liberate our people. *However, Mr. Toivo requested me to draft few petitions for the Ovamboland P. Congress* and also to

[1] *Kerina to Toivo Ja Toivo*, 14 Feb. 1959.
[2] *Ibid.*, 21 Apr. 1959.

consult (no va Russa) they are the only one who could do something for us to have this question solved. I am sure that now that I have Kozongwizi by my side our efforts here will proof effective. I am arranging for Kozongwizi and I to meet with (no va Russa) privately to see as to whether they could help us. But, please if we take a stand in that direction here, stand firm all of you at home and support us. Your position should be very simple, e.g.:

'Your petitioners to the UNO are the only one authorized to take measures that would help to solve the question and that you have nothing to say publicly until you hear from them.' [1]" (Italics added.)

(d) *Letter to Sam Nujoma, dated 16 September 1959:*

"We anticipate great difficulty in this UNO General Assembly session because all indications are that the South African Government will come forward with a few conciliatory proposals which will sound good and impress some but mean absolutely nothing. We have also to be wary of those who are willing to go too far in their compromises just to get some solution or quasi solution to the problem. We should adamently fight all those unaceptable ideas . . . I shall send you more information as it becomes available and when it does reach you *please act forcefully and violently in the positive sense of the word.* . . .

After careful and thoughtful consideration of our situation I think it is advisable for you Mr. Nuyoma and your friends to think about the possibility of turning your organization into a full fledge national organization representing every body in the whole territory. I further suggest that it would be to our advantage if you can change the name of the Ovamboland Peoples' Organisation to *The South West African National Congress. This can mean that we who are representing you at the UNO now have power behind us.* It was very good to start with a regional organization but now your tactics should be geared to the achievement of something greater for South West Africans. *Other African states would support us strongly if we can have such a national organization.* Please do inform the UNO if you change the name of the present organization to that of S.W., African National Congress, this is very important for our position here. *I am sending you under separate cover a copy of a constitution for the Congress* that I have proposed and a manifesto to be distributed widely if you approve of the idea [2]." (Italics added.)

(e) *Letter to Sam Nujoma, dated 25 September 1959:*

"Mr. Nujoma, continue to attack the Government openly in public. Do not stop. In the meantime, as soon as I think of something important I will inform you. *Refuse to move to the new location. Tell the people not to move. I will send you a statement which you should read to them and translate it into Ovambo, Herero, Nama, etc.*

Also try to organize Mass Public Meetings every Saturday. Talk to the people tell them to stand together [3]." (Italics added.)

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[1] *Kerina to Kapuuo*, 30 Apr. 1959.
[2] *Kerina to Sam Nujoma*, 16 Sep. 1959.
[3] *Ibid.*, 25 Sep. 1959.

(f) *Letter from Kerina in New York to Sam Nujoma, dated 17 October 1959:*

"*Do not move from the location. Refuse completely* [1]." (Italics Added.)

(g) *Letter to Toivo Ja Toivo, dated 17 November 1959:*

"*I am working with the African States on this matter and I have offered my assistance if they so desire to help them to gather legal evidence with regard the case.* Everything is going on well. I think one of the African States wants me to go to their country to work with them on this case. I will inform you on this as soon as I have everything clear. . . .

Toivo, listen. I have been urging Mr. Nujoma to change the name of Ovamboland Peoples' Organization into the *South West African National Congress.* This will give the organization a national character which can be of great use to our position here. *I have also drawn up a draft constitution for him for this purpose.* He informed me recently that this Congress will be formed next year. Would you please get in touch with him and tell him that he should try to see that you Toivo or Him be the president. Or one of you the President and a Herero a Vice-President etc. You see what I want to say is that *do not allow the OPO when it is changed into the S.W. African National Congress to be dominated by other groups.* Be very careful about this very much. But please even if other groups do not want to co-operate with the OPO to form the Congress just go ahead and change the OPO to the new Congress. *Please write or talk to Mr. Nujoma about this* and keep it very secret do not tell any one of this idea it should just between you two [2]." (Italics added.)

(h) *Letter to Sam Nujoma, dated 9 December 1959:*

"*On the subject of location removal we can only advise you to continue in your efforts to encourage the people in their firm attitude not to move. On such an issue as this, on which the people must maintain their unity and firmness, our whole case can be established or lost.* We must stand united and refuse to move. If the administration is forced to use violence they will show their true character to the world. We do not want to see one drop of African blood shed, but we must face that possibility and make the most of it. There is one thing which help and which we suggest be commenced immediately. That is this. Each person whose house is evaluated and who is forced to sign should individually send a petition on behalf of his family (stating the number of people involved) to the UNO stating the date on which the evaluation is made, his determination not to go; the unreasonableness of the govt; and his knowledge that African blood is about to be shed because the Administration is determined to move the people by force.

You must stress the urgency of the situation and the fact that U.N. is being informed so that this ultimate conflict can be avoided. *Several hundred petitions should flood the U.N. immediately!!!* We leave the rest to you—please also inform the people at Walvis Bay to follow this same course. *As many petitions as possible should be despatched to U.N. as soon as possible. . . .*

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[1] *Kerina to Sam Nujoma,* 17 Oct. 1959.

[2] *Kerina to Toivo Ja Toivo,* 17 Nov. 1959.

What we think is needed is an effectively functioning outside organization as well as active territorial organizations which can co-ordinate objectives and programs so that we can obtain maximum benefit from every situation which will arise, it is imperative that we fight this battle on all fronts (1) In the territory (2) At the U.N. and (3) Among our African brothers [1]." (Italics added.)

4. As will have appeared from Kerina's letters [2], one Kozonguizi had joined him in New York during 1959. The contents of some of Kozonguizi's letters to his associates within the Territory are also relevant with regard to the methods to be followed in the campaign. Some extracts are cited below.

(a) *Letter to Sam Nujoma, dated 14 September 1959:*

"Please *try to organise people at home:*

(1) *Against the Removal of the Location;*
(2) *Hold a big S.W.A. Day to coincide with our petitioning the U. Nations.*
(3) Give me more information about Rev. Hamtumbangela and Toivo in Ov'land [3]."

(b) *Letter to Louis Nelengani* [4], *dated 12 October 1959:*

"Monday we shall be commencing with the battle at the United Nations. Louw made a statement but I don't think he will be present to hear us—he said he shall be leaving on Monday. But Van der Wath will stay on a little while. He is also going to make a statement. *But* we shall blast him. We have a team of seven. Rev. M. Scott, Mburumba Kerina, Hans Beukes, Emery Bundy, S. Bull, Al Lowenstein and myself. And we shall all blast them like anything. *Keep up the Light—Work, Work, and Work*—that is what we have to do [5]."

5. The above extracts afford clear proof of a campaign against Respondent's administration—a campaign involving incitement and intimidation of the indigenous population of South West Africa, the organization of incidents within the Territory which could be "played-up" on international platforms, large-scale transmission to the United Nations of petitions, in some cases drafted in New York and sent to the Territory for signature by local associates, and the seeking of military intervention by other States.

6. It is also clear from the above extracts that the campaign further involved the creation of organizations which would appear to have widespread support within the Territory. As will be indicated below, a number of political organizations were accordingly founded.

(a) In 1958 Toivo Ja Toivo founded the Ovamboland Peoples Congress. After Kerina's letter referred to in paragraph 3 *(a)* above, the name Ovamboland Peoples Congress was, in April 1959, changed to the Ovamboland Peoples Organization (OPO), with Sam Nujoma as President. After Kerina had suggested [6] that a name which denoted a

[1] *Kerina to Sam Nujoma*, 9 Dec. 1959.
[2] *Vide* para. 3 *(c)*, *supra*.
[3] *Kozonguizi to Sam Nujoma*, 14 Sep. 1959.
[4] The person referred to in para. D.6 at I, p. 176.
[5] *Kozonguizi to Louis Nelengani*, 12 Oct. 1959.
[6] *Vide* para. 3 *(d)*, *supra*.

national rather than a regional organization would suit his purposes better at the United Nations, the name of the Ovamboland Peoples Organization was changed to the South West Africa Peoples Organization (SWAPO) in June 1960. Messrs. Nujoma, Kerina, Louis Nelengani and Toivo Ja Toivo were some of the prominent leaders of this organization.

Other petitioners who feature in the extracts relied on by Applicants and who had close links with the upper command of SWAPO included Messrs. Mifima [1], Shoombe [2] and Headman Hosea Kutako. Hosea Kutako appointed Kerina as his representative overseas, and made a practice of sending petitions to the United Nations in collaboration with SWAPO.

(b) In 1959 Kozonguizi, at the request of the Rev. Michael Scott [3], was sent to the United Nations as the personal representative of Hosea Kutako [4]. After his departure, the South West Africa National Union (SWANU) was launched during August 1959 with the assistance of Kapuuo [4], the deputy of Headman Hosea Kutako. Kozonguizi was elected President and became the spokesman for the Organization at the United Nations. Louis Nelengani, the Vice-President of the Ovamboland Peoples Organization [5], was elected National Treasurer of SWANU, and Sam Nujoma [6], the President of OPO, and John Muundjwa [6] were also elected to the National Executive of SWANU.

(c) A third movement was also originated with the same objectives as SWAPO and SWANU, namely SWANIO (South West Africa United National Independence Organization). Two of the members of this organization are the petitioners, the Rev. Markus Kooper [7], at present its representative at the United Nations Organization, and Mr. Johannes Dausab, of Hoachanas [8].

7. In order to influence international opinion, the leaders of the aforesaid campaign adopted a system of flooding the world in general, and the United Nations Organization in particular, with continuous allegations of suppression and atrocities allegedly committed by Respondent. This was done mainly by the submission of written and oral petitions to the United Nations Organization. In this way there came into being a group of what may be called "professional petitioners". These petitioners are united by their common purpose to end Respondent's administration of South West Africa "by all means" [6], to "smash the Whites out of the Government" [6], to "get South West Africa back no more no less" [6].

As can in the circumstances be understood, these petitioners will find fault with, and will detect ulterior motives in, every act of Respondent's administration. They constantly scheme and devise means to bring Respondent's administration into discredit, and, as the above review

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[1] I, para. D.5, p. 176.
[2] *Ibid.*, para. E.2, p. 178.
[3] *Vide* paras. 3 *(a)* and 4 *(b)*, *supra*.
[4] *Ibid.*, para. 3 *(c)*.
[5] I, para. D.6, p. 176.
[6] *Vide* para. 2, *supra*.
[7] I, para. C.1, p. 170.
[8] *Ibid.*, para. B.2, p. 168; para. B.3, p. 169; para. C.4, p. 171; para. D.1, p. 172.

has shown, are prepared to distort the facts and to present a false picture in their petitions to "flood the U.N." [1].

8. It is submitted in the light of the aforegoing that the majority of the petitioners relied on by Applicants cannot be regarded as a "wide variety of independent sources".

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[1] *Vide* para. 3 *(h)*, *supra*.

SECTION B

ALLEGED VIOLATIONS BY RESPONDENT OF ARTICLE 4 OF THE MANDATE

CHAPTER I

STATEMENT OF THE LAW

1. Applicants, in their Submission 6, request the Court to declare that—

> "the Union, by virtue of the acts described in Chapter VII herein, has established military bases within the Territory in violation of its obligations as stated in Article 4 of the Mandate and Article 22 of the Covenant; that the Union has the duty forthwith to remove all such military bases from within the Territory; and that the Union has the duty to refrain from the establishment of military bases within the Territory; [1]".

2. Article 4 of the Mandate, to which reference is made in the said Submission, read as follows:

> "The military training of the natives, otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory."

Although the complaint made by Applicants is confined to an alleged violation by Respondent of the prohibition against the establishment of military bases—contained in the second sentence of Article 4—it is desirable, with a view to a proper appreciation of the scope of that prohibition, to have regard to all the provisions concerning military activities contained in the Article, read in conjunction with the provisions of the Covenant.

3. Article 22 (6) of the Covenant provided that territories such as South West Africa could—

> ". . . be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population".

The said "safeguards" were those mentioned in Article 22 (5), which provided, in so far as is here relevant, for the administration of mandated territories under conditions which would guarantee, *inter alia*—

> ". . . the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory . . ."

4. The abovementioned safeguard, which was reflected in Article 4 of the Mandate for South West Africa, was no doubt conceived in the

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[1] I, p. 198.

interests of the indigenous population so as to prevent their military exploitation by the Mandatory. It was probably also intended to prevent the Mandatory from using the mandated territory as a base of aggression, by training large Native armies, or by establishing military or naval bases in the Territory. Respondent submits, however, that the Covenant and Article 4 of the Mandate were clearly not intended to render the mandated territory incapable of local defence, or to make it impossible for Respondent to act in defence of the Territory. The duty—and the right—to defend the Territory, is that of Respondent, who has, in terms of Article 2 of the Mandate, full powers of administration and legislation in respect of the Territory, and who is responsible not only for the maintenance of order in the Territory, but also for its safety.

5. That the purpose of Article 4 was as stated above, appears also from its specific provisions. Thus the first sentence of the Article was concerned only with the military training of *Natives*, and prohibited such training only if it was for purposes *other* than "internal police and the local defence of the Territory". The only possible construction of this provision is that the Mandatory was permitted to afford military training to Natives for the purposes of internal police and local defence. And, inasmuch as the Article contains no provision restricting the military training of persons *other* than Natives, such persons could be trained for any lawful purpose.

6. The correctness of the construction of the first sentence of Article 4 as set out in the aforegoing paragraph, is demonstrated by the history of events and proposals before and during the Paris Peace Conference, as related in this and the following paragraphs.

General Smuts, in his plan for a League of Nations issued in December 1918, proposed the idea to make it impossible for Mandatory States to form "... military forces beyond the standard laid down by the League for purposes of internal police" [1]. President Wilson had set forth two principles:

> "First, armament of all States 'will be reduced to the lowest point consistent with domestic safety.' ... That is, troops were to be raised merely to maintain internal order.
>
> Second, the Powers which were to have mandatory rights over these undeveloped peoples were to act as trustees for them and not to benefit from their trusts. If troops were to be raised in colonies they were to be used for the benefit and protection of the people of the colonies and not for the benefit of the power that held the mandatory [sic] [1]."

After studying the plan of General Smuts, President Wilson proposed that:

> "The mandatory State or agency shall in no case form or maintain any military or naval force in excess of definite standards laid down by the League itself for the purposes of internal police [2]."

7. During the discussions at the Peace Conference, the above proposals were considerably broadened in their aspects of what would be per-

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[1] Baker, R. S., *Woodrow Wilson and World Settlement* (1922-1923), Vol. I, p. 424.
[2] *Ibid.*, p. 425.

missible to the Mandatories. France in particular objected to any idea of severely limiting the Mandatories' rights in this regard [1].

In the draft submitted by Mr. Lloyd George on 30 January 1919 provision was made for military training for the purpose of "defence of territories" apart from military training for "police purposes". The draft provided:

> "The mandatory must ... guarantee the prohibition of ... the arms traffic ... and the prevention of the establishment of fortifications or military or naval bases, and of the military training of the natives for other than police purposes and the defense of territories [2]."

8. The intended scope of this draft provision was discussed in the Council of Ten, and as a result of questions by the French delegate, M. Clemenceau, Mr. Lloyd George said:

> "... there was nothing in the clause under review to prevent volunteer forces being raised. The words used were: 'For other than police purposes and the defense of territory.' He really thought those words would cover the case of France. There was nothing in the document which would prevent her doing exactly the same thing as she had done before. What it did prevent was the kind of thing the Germans were likely to do, namely, to organize great black armies in Africa, to be used for the purpose of clearing everybody else out of that country [3]."

And he concluded by saying: "There was nothing in this document which would prevent France raising an army for the defense of her territories [3]."

Further debate on the matter is recorded as follows:

> "M. Clemenceau said that if France had the right in the event of a great war to raise troops in African territories under her control, he would ask for nothing more.
>
> Mr. Lloyd George replied that France would have exactly the same rights she had previously enjoyed. The resolution proposed by him was only intended to prevent a mandatory from drilling all the natives and from raising great armies.
>
> M. Clemenceau said that he did not want to do that. All that he wished was that the matter should be made quite clear, and he did not want anybody to come and tell him afterwards that he had broken away from the agreement. If this clause meant that France had the right to raise troops in the African territories under her control in case of a general war, he was satisfied.
>
> Mr. Lloyd George said, that so long as M. Clemenceau did not train big nigger armies for the purposes of aggression, that was all the clause was intended to guard against.
>
> M. Clemenceau said that he did not want to do that. He therefore understood that Mr. Lloyd George's interpretation was adopted.
>
> President Wilson said that Mr. Lloyd George's interpretation was consistent with the phraseology.
>
> M. Clemenceau said that he was quite satisfied [4]."

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[1] Baker, R. S., *Woodrow Wilson and World Settlement* (1922-1923), Vol. I, pp. 426-432.

[2] *Ibid.*, p. 426.

[3] *Ibid.*, p. 427.

[4] *Ibid.*, p. 428.

It is also recorded that:

> "It was agreed that the acceptance of the resolutions proposed by Mr. Lloyd George would not prevent mandatories from raising volunteers in the territories under their control for the defense of their countries in the event of their being compelled to attack [1]."

Whatever doubt there may have been as to whether a Mandatory should be entitled to train the Natives of a mandated territory for the defence of *its other possessions*, there was, as the record shows, no doubt that a Mandatory was to be entitled to train the inhabitants of a mandated territory (including the Natives) for the defence of *that mandated territory*.

9. In the premises aforestated, Respondent submits that the first sentence of Article 4 of the Mandate and the corresponding provisions in the Covenant, permitted the military training of the inhabitants of the mandated territory (including the Natives) for the purpose of internal police and local defence of the Territory.

10. The second sentence of Article 4 of the Mandate prohibited, *inter alia*, the establishment of "military bases" in the Territory. Neither the Covenant of the League of Nations nor the Mandate contained any definition of the term "military base". The following definitions are given in well-known dictionaries:

(a) *Webster's Complete Dictionary of the English Language* (New ed. of 1880), p. 111.
Base (military): "A tract of country protected by fortifications, or by natural advantages, from which the operations of an army proceed."

(b) *Webster's New International Dictionary of the English Language* (2nd ed.), p. 15.
Base (military and naval): "The locality on which a force relies for supplies *(base of supplies)*, or from which it initiates operations *(base of operations)*; as, a submarine *base*."

(c) *The Shorter Oxford English Dictionary on Historical Principles* (3rd ed.), p. 150.
Base (military): "The line or place relied upon as a stronghold and magazine, and from which the operations of a campaign are conducted."

A common feature of these definitions is that a base is something *utilized* by a *force* or an *army* for the purposes of *operations* or a *campaign*. The utilization may be either—

(i) as a starting point for the operations or campaign, or
(ii) as a source of supplies required for the operations or campaign, or both.

Consequently, failing the *purpose of utilization for operations or a campaign, actual or prospective, by a force or an army*, a place cannot be said to be maintained as a military or naval base.

In the light of the foregoing it is submitted that the term "military base" does not include a military training camp which is used only for purposes of the military training of recruits. It is clear that such a camp would not have the essential feature of a military base, viz., utilization for operations or a campaign by a force or army. Furthermore, whereas in

[1] Baker, R. S., *Woodrow Wilson and World Settlement* (1922-1923), Vol. I, p. 428.

terms of Article 4 military training is permissible, and would indeed fall within Respondent's duties, it is inconceivable that the prohibition against military bases was intended to extend to ordinary military training facilities.

11. Support for the aforestated contention is found in the practice of other Mandatories during the lifetime of the League of Nations. Practically all the African territories under mandate had considerable permanent military forces stationed within their boundaries, and trained Natives for police and local defence purposes. These territories had facilities for their military forces, for military training, and for supplies, maintenance, armament, material and transport. And although military activities in these territories often formed the subject of discussion in the Permanent Mandates Commission [1], it is significant that it was never suggested in the Commission or in the League Council that the Mandatories concerned had, in providing the said facilities, established "military bases" or "fortifications" in violation of the military clauses in their Mandates, which were the same as Article 4 of the Mandate for South West Africa.

12. As an example of the military activities of other mandated territories, Respondent refers to the case of Tanganyika, a British Mandate. It appeared during the Eighteenth Session of the Permanent Mandates Commission, held in June 1930, that in Tanganyika two battalions of troops were divided into detachments as small garrisons, and that one battalion in reserve was concentrated at a single point where it could devote itself entirely to training. M. Palacios, a member of the Permanent Mandates Commission, asked whether this constituted a military base, but the reply was that the scheme did not constitute a military base [2]. The Commission was apparently satisfied with the answer given, and the scheme was not criticized in any way.

13. Applicants, in charging Respondent with a violation of Article 4 of the Mandate, contend that Respondent maintains three "military bases" within the Territory of South West Africa. This contention is based upon their formulation of the following legal propositions regarding the provisions of Article 4:

> "Armed installations not related to police protection or internal security fall within the class of 'military bases' or 'fortifications' and are therefore prohibited by Article 4 of the Mandate. Facilities for police or internal security purposes are permitted, but no military bases. The type of facility, its location, armament, equipment, organization and place in the Union's administrative hierarchy and chain of command determine whether it is a military base or fortification [3]."

Although Applicants, in the last sentence of this formulation, refer to various considerations which could determine whether a particular facility is or is not a "military base" or "fortification", they appear to ignore all these considerations in their application of the law to the

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[1] *Vide, e.g., P.M.C.*, Min., III, p. 142; IX, p. 147; XIII, p. 147; XIV, p. 127; XV, p. 110; XVIII, p. 34.
[2] *Ibid.*, XVIII, p. 34.
[3] I, p. 181.

facts [1], where the sole criterion applied to each facility appears to be the fact (as Applicants contend) that "its purpose is not police protection or internal security".

Respondent submits that, for the reasons hereinafter stated, the basis of Applicants' submissions regarding the law rests on a misconception of the provisions of Article 4.

14. The basic fallacy in Applicants' statement of the law is that they use the limitation in the first sentence of Article 4 with regard to the *training of Natives* [2] as their criterion in determining whether a military installation or facility is a "military base".

Although there would be an interconnection between the limitations imposed on the military training of Natives and the prohibition against the establishment of military bases, the former cannot in itself serve as the criterion for determining whether a particular installation or facility is a military base.

15. In submitting that—"Armed installations not related to police protection or internal security fall within the class of 'military bases' or 'fortifications' . . . ," Applicants ignore the distinction between training of Natives and training of non-Natives. The distinction is important because the authors of the Covenant were not concerned about military training *generally*, but about military training of the Natives [3] hence the limitation of military training for certain purposes was, in the express terms of Article 4 of the Mandate, made applicable to Natives only. An "armed installation" can, of course, legitimately be used for the training of *non-Natives*, in which case the restriction upon training of Natives cannot serve as a criterion in determining whether such installation is or is not a "military base".

16. Moreover, Applicants render the term "local defence", which appears in Article 4, as "internal security", an expression not used in the said Article. Applicants' rendering in effect reduces the two concepts in Article 4, viz., "internal police" and "local defence", to one, called by Applicants "police protection or internal security". In such rendering the concept of "local defence" falls out of consideration altogether. There is, it is submitted, a wide difference between the expression "local defence of the territory" which appears in Article 4, and the words "internal security" in the sense contended for by Applicants. The words "local defence of the territory" would include the defence of the Territory against external aggression.

The omission of the concept of "local defence" is therefore a further important respect in which Applicants err in their formulation and application of the statement that "Armed installations not related to police protection or internal security fall within the class of 'military bases' or 'fortifications' . . ." The significance is apparent particularly in Applicants' reasoning leading to their *Legal Conclusions.*[1] Thus they argue, in respect of the Regiment Windhoek, that "Armoured corps are not normally used for police protection or internal security purposes" [4],

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[1] I, pp. 182-183.
[2] Moreover, in a distorted form; *vide* para. 16, *infra*.
[3] *Vide* para. 8, *supra*.
[4] I, p. 182.

and further that the fact of the Regiment being "... part of a conventional military organization also indicates that its purpose is not police protection or internal security" [1]. On this basis they then conclude that facilities pertaining to the Regiment are to be regarded as constituting a military base. In this process they clearly ignore that "armoured corps" and the fact of being "part of a conventional military organization" are perfectly consistent with a possible, and legitimate, purpose of local defence [2].

Similar treatment is given by the Applicants, in their *Legal Conclusions*, to the alleged "military landing field at Swakopmund" and the alleged "military camp" and/or "military airbase" in the Kaokoveld [3].

It is therefore evident, in Respondent's submission, that the inferences drawn by Applicants in their *Legal Conclusions* from the words "police protection or internal security" cannot validly be drawn from the expression "internal police and the local defence of the territory", and that the inferences drawn by Applicants are thus as unjustified as is the substitution of the former expression for the latter.

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[1] I, p. 182.

[2] Which is in fact the case as far as the ultimate purposes of the Regiment Windhoek are concerned. *Vide* Chap. II, paras. 2-8, *infra*.

[3] I, p. 183.

CHAPTER II

THE ALLEGED MILITARY BASES IN SOUTH WEST AFRICA

A. General

1. Applicants allege, "upon information and belief", founded on "statements contained in the 'Report of the Committee on South West Africa' for the years 1959 and 1960", that Respondent "maintains three 'military bases' within the Territory" [1]. In support of these allegations Applicants advance practically no original evidence, although an attempt is made to explain this weakness by alleging that Applicants have not been able to make an independent verification of the existence or non-existence of bases or fortifications in the Territory.

Respondent states categorically that Article 4 of the Mandate has been administered conscientiously and in the spirit of the Mandate. There has been no military training of the Natives for any purpose, except during the Second World War, when a special company of Native soldiers was trained in the Eastern Caprivi Zipfel, and members of the Native groups in other parts of the Territory were trained in the Native Military Corps, a non-combatant unit, to assist in the local defence of the Territory. At the end of the Second World War these units were demobilized, and there has since been no training of Natives. No military bases and no fortifications have been erected or established in the Territory.

B. The Regiment Windhoek

2. During the 1920s no permanent military force existed within South West Africa. For its defence the Territory relied upon the Burgher Force established by Proclamation No. 2 of 1923 (S.W.A.) [2]. This Proclamation was referred to at page 1 of the Report of the Administrator of South West Africa for the Year 1923 which was submitted to the League of Nations as Respondent's annual report of the administration of South West Africa for 1923 [3]. In Respondent's report for the year 1925 the organization of the Burgher Force was described as follows:

> "There is no premanent [permanent] military organization. Apart from the Police Force the Territory relies for its defence upon the burgher force established by Proclamation No. 2 of 1923, as amended by Proclamations Nos. 37 of 1923 and 35 of 1924.
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> The regulations framed under the former are published under Government Notice No. 23 of 1923 (see page 94, Laws of South West Africa, 1923). Every male European resident of the Territory between the ages of 18 and 55 is liable to be called out in the defence

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[1] I, p. 181.

[2] As amended by *Proc.* No. 37 of 1923 (S.W.A.), 14 Nov. 1923, in *Official Gazette of South West Africa*, No. 122 (1 Dec. 1923), pp. 1441-1442, and by *Proc.* No. 35 of 1924 (S.W.A.), 29 Dec. 1924, in *The Laws of South West Africa 1924*, p. 191.

[3] *U.G.* 21—1924.

of the Territory if necessary, subject to certain exemptions which are set out in Section 2 of the first-mentioned Proclamation. Every person liable for service is registered.

Under Section 10 the Administrator may from time to time assemble the burgher forces for inspection and rifle practice.

The Force is divided into two classes *(a)* including all enrolled between the ages of 18 and 35 and *(b)* between the ages of 35 and 55.

Whenever it becomes necessary for the defence of the Territory or for the protection of life and property the Administrator may by notice in the *Gazette* call out the whole or part of the Force. Where only part is called out class *(a)* must first be drawn on.

Every burgher is provided with a rifle and 50 cartridges, which must be kept for emergency purposes.

For active service he uses his own horse if he has one, and upon mobilisation must report at the place of assembly with greatcoat and blankets.

The officers are appointed by the Administrator.

As regards training, this takes the form of rifle practice, which is encouraged by the Administration.

The Administration defrays the cost of rifle ranges and pays into the 'Corps Fund' of each commando or independent squadron a capitation grant of five shillings in respect of every burgher of such commando who has qualified himself as efficient at the annual target practice. Fifty rounds of ammunition are granted annually free to each burgher for rifle practice, and he may obtain further supplies for that purpose at cost price [1]."

3. In Respondent's Annual Report to the Council of the League of Nations concerning the administration of South West Africa for the year 1929 [2], an exposition was given of the defence organization within the Territory at that time. The relevant paragraphs of that report are cited in Annex A, *infra*. This organization was based on the Burgher Force Proclamation, No. 19 of 1927 (S.W.A.), which had superseded the abovementioned Proclamation No. 2 of 1923 (S.W.A.). In brief, the new Proclamation imposed upon every able-bodied male European resident of the Mandated Territory, who was a natural-born or naturalized British subject, and who had completed his twentieth but not his fifty-sixth year, the duty to render personal service as a Burgher in the defence of the Territory and the protection of life and property therein, and to undergo such military training as might be prescribed or directed by the Administrator [3].

While the Administrator had power to call up the whole or any part of the Burgher Force for military training, such a call-up had not taken place up to the stage when the 1929 report was compiled [4], nor indeed thereafter, as will appear below. In the said report it was mentioned that the persons then registered as being liable for service under the Burgher Force Proclamation numbered 6,259 [5].

During discussions in the Permanent Mandates Commission in 1930

[1] *U.G.* 26—1926, pp. 94-95.
[2] *U.G.* 23—1930.
[3] *Ibid.*, para. 61, p. 10.
[4] *Ibid.*, para. 66, p. 11.
[5] *Ibid.*, para. 63, p. 10.

regarding the abovementioned military organization, doubts were expressed as to the efficiency of the Force. It is reported that:

> "... M. Sakenoble [sic] felt somewhat doubtful as to the efficiency of the force. Was it considered that the force was really adequate for the defence of the territory and for the maintenance of law and order? [1]"

4. The defence organization described above remained unchanged until 1939. Military training never developed to a point beyond rifle practice and during the years 1931 to 1935 financial considerations led to a curtailment even of that. The Burgher Force was never called up for military training [2], and during the period 1936 to 1939 its organization came to an almost complete standstill.

5. By Proclamation No. 234 of 1939 (S.A.) it was provided, *inter alia*, that the South African Defence Act of 1912 [3], and all amendments thereto, together with the regulations made thereunder, would apply to South West Africa. The outbreak of the Second World War necessitated a better military organization in order to secure peace and order in the Territory and to safeguard Respondent's position as Mandatory [4].

On 1 December 1939 the First South West Africa Infantry Battalion, with headquarters at Windhoek, was established as an Active Citizen Force unit of the Union Defence Force [5]. The Battalion was established for the purpose of assisting, if necessary, the Police Force in protecting the mandated territory in general, and, more particularly, in protecting its essential services against possible internal disturbances or raids or landings from enemy vessels. During 1940 the unit was mobilized as a war-time volunteer battalion. On 16 January 1943 the unit was disestablished.

6. A Citizen Force unit, named the South West African Infantry, was established as a unit of the Union Defence Force in 1946 [6]. During 1957 the unit was redesignated as "Regiment Suidwes-Afrika" and from 1 June 1960 it was further redesignated as "Regiment Windhoek" [7].

The Regiment Windhoek is a Citizen Force regiment with administrative headquarters at Windhoek. With reference to Applicants' factual allegations regarding this Regiment [8], Respondent admits that the Regiment is a part of the South African Armoured Corps of the Citizen Force, which forms an integral part of the South African Defence Forces, and admits that on 1 December 1959, it consisted of 16 officers and 205

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[1] *P.M.C., Min.*, XVIII, p. 148.

[2] *Vide U.G.* 21—1931, para. 91, p. 16; *U.G.* 17—1932, para. 70, p. 12; *U.G.* 16—1933, para. 75, p. 12; *U.G.* 27—1934, para. 65, p. 9; *U.G.* 31—1937, para. 46, p. 11.

[3] Act No. 13 of 1912, amended by Act No. 43 of 1917, Act No. 25 of 1918, Act No. 22 of 1922 and Act No. 32 of 1932; *vide The Union Statutes 1910-1947*, Vol. 5, pp. 111-243.

[4] *U.G.* 30—1940, paras. 168-169, p. 33.

[5] *G.N.* No. 1977 (S.A.), 8 Dec. 1939, in *The Laws of South West Africa 1939*, Vol. XVIII, p. 138.

[6] *G.N.* No. 841 (S.A.), 18 Apr. 1946, in *The Union of South Africa Government Gazette*, Vol. CXLIV, No. 3634 (18 Apr. 1946), p. 123.

[7] *G.N.* No. 458 (S.A.), 1 Apr. 1960, in *Government Gazette* (S.A.), Vol. CC, No. 6395 (1 Apr. 1960), p. 48.

[8] I, pp. 181-182.

other ranks. At present this Regiment consists of 20 officers and 221 other ranks. Respondent denies, however, that the Regiment is stationed at Windhoek. Only a small permanent force administrative staff, consisting of three officers and seven other ranks, is permanently stationed at Windhoek. The Citizen Force recruits of the Regiment are ordinary civilians of South West Africa whose only peace-time military obligation is to attend two training courses, of 14 days each, during a period of three years, at the training camp at Windhoek. They are not in permanent military service, and, except when in training, they reside in their own homes at places scattered throughout the Territory.

The training camp at Windhoek serves only the purposes of the Regiment Windhoek. In other words it caters for the European citizens domiciled in South West Africa who are required to undergo peacetime military training as aforementioned. There is no military training of the Natives. *Owing to the limited training and the comparatively small number of* Citizen Force personnel involved, the training camp is utilized only for very short periods at a time. For the major part of the year, therefore the camp is not used for military training purposes.

7. In conclusion Respondent may point out that the inclusion of the Regiment Windhoek as a part of the South African Armoured Corps of the Citizen Force does not mean that it is an armoured unit. Regiments are grouped for convenience. The Regiment is actually equipped with what are internationally known, and used, as light reconnaissance vehicles, viz., armoured cars.

8. The Regiment, constituted and organized as set out above, is the bare minimum required for the defence of the Territory and for internal security. Its facilities and equipment serve only the purpose of training European persons, and are in no way intended to serve as the starting point of, or the source of supplies for, operations or a campaign of a force or army. The facilities, vehicles and material of the Regiment do therefore not constitute a "military base" as alleged by the Applicants [1].

C. The Alleged Military Landing Ground in the Swakopmund District of South West Africa

9. Respondent denies that a military landing ground is maintained in the Swakopmund district of South West Africa [2]. At Swakopmund there is only a civilian landing field. The landing ground to which Applicants apparently refer is that situated on the farm Rooikop No. 19, and known as Rooikop Landing Ground. This landing ground is not situated within the territorial boundaries of South West Africa, but falls within the area known as the port and settlement of Walvis Bay. The port and settlement of Walvis Bay is South African territory and was not included in the Mandate conferred on Respondent [3]. The farm

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[1] I, pp. 182-183.

[2] *Vide* Applicants' allegation in I, p. 183.

[3] The British annexation of Walvis Bay predated the proclamation of a German Protectorate in South West Africa; *vide* British Letters Patent dated 14 Dec. 1878, in *British and Foreign State Papers 1878-1879*, Vol. LXX, pp. 495-496. The port and settlement of Walvis Bay was annexed to the Colony of the Cape of Good

Rooikop No. 19 is situated in registration division F, which is the Walvis Bay registration division. In proof of the above facts Respondent annexes hereto affidavits by the Registrar of Deeds, South West Africa, and the Surveyor-General, marked Annex B and Annex C respectively.

10. In stating in its report for the year 1959 that the aforesaid landing ground is situated in the Swakopmund district of South West Africa [1], the Committee on South West Africa may have been misled by the wording of Government Notice No. 636 of 1958 (S.A.) [2] which prohibited access to the said landing ground, and which described the farm Rooikop No. 19 as situated in the district of Swakopmund. The reason why the situation of the farm was so described, is that in 1922, Respondent, for administrative reasons, provided by Act No. 24 of 1922 that from a date to be fixed by the Governor-General by proclamation—

> "... the port and settlement of Walvis Bay which forms part of the province of the Cape of Good Hope shall be administered as if it were part of the mandated territory ... [3]"

The date from which the above provision became effective was fixed as the first day of October 1922 [4].

By Proclamation No. 30 of 1922 (S.W.A.), and by virtue of the powers delegated to him by section 1 of Act No. 24 of 1922, the Administrator of South West Africa decreed that:

> "The said port and settlement of Walvis Bay shall be deemed to form portion of the District of Swakopmund created within this Territory ... [5]"

The Permanent Mandates Commission was aware of this administrative arrangement, and in its report to the League Council in 1922 it—

> "... noted that the territory of Walvis Bay had been treated as if it formed part of the mandated territory, whereas it was not, in fact, included in that territory [6]."

The area of Walvis Bay was administered as part of the magisterial district of Swakopmund until 1958, when a separate magisterial district named Walvis Bay was proclaimed [7].

D. The Alleged Military Camp or Military Air Base in the Kaokoveld

11. Respondent denies that it maintains any military camp or air base in or near the Kaokoveld [8], or anywhere else in the Territory of South West Africa.

Hope on 7 Aug. 1884; *vide Proc.* No. 184 of 1884 (Cape of Good Hope), 7 Aug. 1884, in *The Cape of Good Hope Government Gazette*, No. 6519 (8 Aug. 1884), p. 1.

[1] I, p. 182.

[2] *G.N.* No. 636 (S.A.), 3 Oct. 1958, in *Government Gazette* (S.A.), Vol. CXCIV, No. 6123 (3 Oct. 1958), p. 22.

[3] Sec. 1 of the Act, in *The Laws of South West Africa 1915-1922*, p. 20.

[4] *Proc.* No. 145 of 1922 (S.A.), 15 Sep. 1922, in *The Laws of South West Africa 1915-1922*, p. 56.

[5] *Proc.* No. 30 of 1922 (S.W.A.), 2 Oct. 1922, in *The Laws of South West Africa 1915-1922*, p. 860.

[6] *P.M.C., Min.*, III, p. 325 (Annex 13).

[7] *Proc.* No. 43 of 1958 (S.W.A.), 21 July 1958, in *The Laws of South West Africa 1958*, Vol. XXXVII, p. 203.

[8] *Vide* Applicants' allegation in I, p. 182.

12. In the Kaokoveld, at Ohopoho, there is a landing strip, created during the Second World War. No personnel or aircraft are retained there. It is one of a few landing strips at various places in South West Africa which are used by the South West African Administration for administrative purposes and only intermittently by aircraft of the South African Air Force.

Apart from the convenience, in this large Territory, of air travel for administrative purposes, Respondent also bears a responsibility for the defence of the Territory against external aggression, as well as for the maintenance of order within the Territory. It has, in addition, the responsibility of undertaking rescue operations in the event of civilian aircraft crashing or getting lost over the area, and for rescue work along the inaccessible sea coast, commonly known as the "Skeleton Coast", in the event of shipwrecks.

These various responsibilities make it imperative that Respondent should maintain landing strips for intermittent and occasional use at various places in the Territory. No defence personnel are stationed at any of these landing strips. They are natural surface strips, which have simply been cleared of vegetation and other obstructions. Maintenance of these strips is usually attended to either by a local farmer or by the local civic authorities. For the purpose of pre-planned flights, it is practice to reconnoitre these strips in advance so as to determine their serviceability or otherwise.

It is imperative that South African Air Force pilots should from time to time be made acquainted with the landing strips within the Territory so as to be able to perform the responsibilities which rest upon Respondent in respect of defence, internal security and rescue operations in the Territory.

Respondent submits that the landing facilities described above clearly do not fall within the description "military base" as used in *Article 4 of the Mandate.*

13. In alleging the existence of a "military camp" or "military air base" in the Kaokoveld, Applicants rely on a statement in the South African Parliament in 1960 regarding a visit by the Minister of Defence to a "military camp during reconnaissance in the Kaokoveld" [1]. The statement referred to a visit by the said Minister to the area of the Kaokoveld during June 1957. The purpose of the visit was to carry out a reconnaissance of this area, and it lasted approximately one week. During that time the Minister and his party, which totalled nine persons, were accommodated in tents specially erected for the purpose. The camp staff totalled six persons while the aircrew who, by means of two Dakota transport aircraft and two helicopters, flew in the Minister and his party (as well as the necessary camp equipment), consisted of 12 persons. These men were also accommodated in tents. The aforestated comprised the total "military camp", which was broken up again at the conclusion of the visit. The camp equipment and tents were flown out by the same aircraft upon the departure of the Minister and his party.

14. The allegation on I, page 181 of the Applicants' Memorials, that:

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[1] *Vide* extract from the 1960 Report of the Committee on South West Africa cited at I, p. 182, which extract in turn refers to *U. of S.A. Parl. Deb., House of Assembly*, Vol. 103 (1960), Col. 577.

> "The Committee on South West Africa has, however noted increased military activity in the Territory, including the staging of aerial maneuvers [sic], described as a large-scale exercise by the Union Department of Defence, in the Eastern Caprivi Zipfel during August 1959",

is not claimed by Applicants to be proof of a contravention of Article 4 of the Mandate, and it cannot be so claimed. The allegation is therefore irrelevant, but Respondent nevertheless will briefly furnish the facts of the incident to which it appears to relate.

During August 1959 aerial manoeuvres were staged in the Eastern Caprivi Zipfel. These manoeuvres were attended by the then Minister of Defence and the Secretary and Deputy-Secretary for Defence, in their official capacities. A total of 12 Harvard aircraft participated, consisting of two flights of six aircraft each. Only one flight participated at any given time, the first flight being replaced by the second at the end of the first week. The exercise was arranged, in the first instance, to comply with a request received from the Department of Bantu Administration and Development to investigate the extent of the tsetse fly menace in the Caprivi Zipfel, and the possible eradication thereof by aerial spraying. The said Department required a preliminary survey of what tsetse fly eradication from the air in the Caprivi Zipfel would involve, and an indication of the extent of bush-clearing that would have to be undertaken before spraying could commence, and of the measure in which the South African Air Force could assist. For this purpose it was necessary to conduct a proper reconnaissance of the area from the air. The reconnaissance at the same time also served other purposes, namely to investigate the feasibility of aerial border patrolwork, and to exercise the pilots concerned in low-level navigation, signals, communications and search, as well as in rescue and survival operations in thickly vegetated and largely uninhabited bush country. As will be apparent, the scope of the exercises were insignificant from a military point of view.

15. From the aforegoing it is clear that there are no military bases in South West Africa. A full explanation of the facts was given to the Fourth Committee of the United Nations Organization during October 1959 [1]. Both Applicants were represented in this Committee, but have apparently not taken note of the facts brought to the attention of the Committee. These facts were later substantiated when M. Carpio and Dr. Martinez de Alva, respectively Chairman and Vice-Chairman of the Special Committee for South West Africa, visited the Territory during 1962. They were given full opportunities of investigation, and were specifically requested to investigate allegations of militarization in the Territory. Their visit in fact included, *inter alia*, Windhoek, the Kaokoveld, Ovamboland and (in the case of Dr. Martinez de Alva) the Caprivi Zipfel—in other words, all the places mentioned by the Applicants in their allegations regarding militarization, except Swakopmund. At the end of their visit, in a statement issued by Respondent's Prime Minister and Minister of Foreign Affairs and the Chairman and Vice-Chairman of the Special Committee, it was stated that:

> "... in the places visited they had found no evidence and heard no

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[1] *G.A., O.R., Fourteenth Sess., Fourth Comm.*, 900th Meeting, 8 Oct. 1959, pp. 86-87.

allegations . . . that there were signs of militarization in the territory [1]."

In a footnote to the statement it was said:

"The Chairman and Vice-Chairman were informed by the South African authorities and noted the existence of a nine-man military administrative headquarters in Windhoek. There is also a unit of the citizens force . . . which undergoes training for two weeks per annum . . . with 17 officers and 206 other ranks [1]."

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[1] *U.N. Press Release* GA/2501, 26 May 1962, *Joint Statement on Pretoria talks following visit of UN Representatives to South West Africa*, p. 1.

CHAPTER III

CONCLUSION

1. Respondent submits that the legal conclusions of the Applicants are based not only on incorrect facts (as indicated in Chapter II above) but also on a misconstruction of the legal position (as dealt with in Chapter I above).

2. Regarding the Regiment Windhoek, Applicants argue that armoured corps "are not normally used for police protection or internal security purposes" [1]. They further argue that the fact that the Regiment forms "part of a conventional military organization also indicates that its purpose is not "police protection or internal security" [1].

This argument fails to take account of the fact that neither the Covenant of the League of Nations nor Article 4 of the Mandate restricts military training of persons other than Natives, and that even in the case of Natives, military training is permitted not only for police purposes, but also for the most important purpose, the local defence of the Territory. The Regiment Windhoek serves for the military training of Europeans only. As there is no military training of Natives, the purposes for which the members of the Regiment are trained are, for present purposes, irrelevant. But even if the qualification of training for "purposes of internal police and local defence of the territory" should be applicable, then it is clear that the Regiment serves just those purposes. Furthermore, the training facilities and equipment of the Regiment are the ordinary facilities and equipment necessary for military training, and do not fall within the description "military base" as used in Article 4 of the Mandate[2].

3. Regarding the alleged landing ground at Swakopmund, Respondent has shown above [3] that the landing ground apparently referred to is in fact not situated within the territorial boundaries of South West Africa, and Applicants' further averments in that regard therefore fall away.

4. Regarding the alleged military camp or air base in the Kaokoveld, Respondent has shown [4] that the landing strip in the Kaokoveld is used mainly for administrative purposes. There are no military personnel stationed at the said landing strip nor are there any military facilities, although military aircraft have at times made use of the strip for purposes of military training, local defence, internal police and rescue operations, which use is in no way prohibited by the Covenant or the Mandate. The landing facility does not fall within the description "military base" as used in Article 4 of the Mandate.

5. Considering the law and the facts set out above, Respondent submits that it has at no time violated the terms of Article 4 of the Mandate, and that military measures taken by Respondent have at all times conformed to both the letter and the spirit of the Covenant of the League of Nations and Article 4 of the Mandate.

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[1] I, p. 182.
[2] *Vide* Chap. II, paras. 6-8, *supra*.
[3] *Ibid.*, paras. 9-10.
[4] *Ibid.*, paras. 11-13.

CHAPTER IV

SUBMISSION

For the reasons hereinbefore advanced, supplemented as may be necessary in later stages of these proceedings, Respondent, as far as this portion of the Counter-Memorial is concerned, prays and requests that Applicants' Submission 6 be dismissed.

Annex A

PARAGRAPHS 61 TO 66 OF THE "REPORT PRESENTED BY THE GOVERNMENT OF THE UNION OF SOUTH AFRICA TO THE COUNCIL OF THE LEAGUE OF NATIONS CONCERNING THE ADMINISTRATION OF SOUTH WEST AFRICA FOR THE YEAR 1929" (U.G. 23—1930, PP. 10-11)

61. No military forces are maintained for the defence of the Territory, but the Burgher Force Proclamation, No. 19 of 1927, imposes upon every able-bodied male European resident of the Mandated Territory who is a natural born or naturalized British subject and who has completed his twentieth but not his fifty-sixth year the liability to render personal service as a burgher in the defence of the Territory and the protection of life and property therein and to undergo such military training as may be prescribed or directed by the Administrator.

62. The Force is divided into two classes, "A" and "B". "A" class includes every person who has completed his twentieth and not his forty-first year, and "B" class every person who has completed his forty-first and not his fifty-sixth year.

63. The number of persons registered as being liable for service under the Proclamation on 31 December last was 6,259.

64. The command and control of the force is vested in a Chief Commandant appointed by the Administrator.

65. For purposes of organization the Territory is divided into five military areas. The burghers residing in each area are formed into commandos according to the military strength of the area. Separate units are established, consisting of classes "A" and "B", the former being known as active and the latter as reserve commandos.

66. While the Administrator has power to call up the whole or any part of the force for military training, this for various reasons, mainly financial, has not hitherto been done. The policy of the Administration has been to encourage rifle practice, and to this end rifle ranges have been provided in all parts of the Territory and burghers are supplied with ammunition for practice at cost price. Annual efficiency shoots are held and for instruction in marksmanship a free issue not exceeding 50 cartridges is made to each burgher. Every burgher must qualify in marksmanship.

Annex B

AFFIDAVIT

I, the undersigned, Gert Hendrik Olivier, hereby declare on oath that:

1. In my capacity as Registrar of Deeds, South West Africa, I have the custody and control of all the records in the Deeds Office.

2. According to the said records the farm Rooikop No. 19, measuring six hundred and twenty-two (622) hectares, one thousand one hundred and eighty-six (1,186) square metres, is situate within the Territory of Walvis Bay. The Walvis Bay registration Division is "F". The said farm has always been situate in the area known as the port and settlement of Walvis Bay and did not form part of the Territory of German South West Africa which later came to be held under Mandate by the Union of South Africa.

Windhoek, this 30th day of October, 1963.

(Sgd.) G. H. OLIVIER
Deponent

The Deponent has acknowledged that he knows and understands the contents of this affidavit.

Sworn and signed before me, Johannes Hendricus Krige, Additional Magistrate of Windhoek, South West Africa, by Gert Hendrik Olivier who is the Registrar of Deeds, South West Africa, and of whose identity I have satisfied myself.

Windhoek, this 30th day of October, 1963.

(Sgd.) J. H. KRIGE
Additional Magistrate of Windhoek
Commissioner of Oaths

I, the undersigned, Charl François Marais, Secretary for South West Africa, do hereby certify that Johannes Hendricus Krige whose signature appears on this document was at the time of signing the Additional Magistrate of Windhoek and ex officio Commissioner of Oaths and that to all Acts, Instruments, Documents and Writings subscribed by him in that capacity, full faith and credence are given in the Territory of South West Africa, in Court and thereout.

Given under my hand and the seal of my Administration at Windhoek on this the 1st day of November, 1963.

(Sgd.) C. F. MARAIS

Annex C

AFFIDAVIT

I, the undersigned, Esmond Errol Smith, hereby declare on oath that:

1. In my capacity as Surveyor-General, South West Africa, I have the custody and control of all the records in the Surveyor-General's Office.

2. The farm Rooikop No. 19 is situate in the Territory of Walvis Bay, Registration Division "F".

3. Registration Division "F" is the Walvis Bay registration Division.

Windhoek this 30th day of October, 1963.

(Sgd.) E. E. SMITH
Deponent

The Deponent has acknowledged that he knows and understands the contents of this affidavit.

Sworn and signed before me, Johannes Hendricus Krige, Additional Magistrate of Windhoek, South West Africa, by Esmond Errol Smith who is the Surveyor-General of South West Africa and of whose identity I have satisfied myself.

Windhoek this 30th day of October, 1963.

(Sgd.) J. H. KRIGE
Additional Magistrate of Windhoek
Commissioner of Oaths

I, the undersigned, Charl François Marais, Secretary for South West Africa, do hereby certify that Johannes Hendricus Krige whose signature appears on this document was at the time of signing the Additional Magistrate of Windhoek and ex officio Commissioner of Oaths and that to all Acts, Instruments, Documents and Writings subscribed by him in that capacity, full faith and credence are given in the Territory of South West Africa, in Court and thereout.

Given under my hand and the seal of my Administration at Windhoek on this the 1st day of November, 1963.

(Sgd.) C. F. MARAIS

SECTION C

ALLEGED VIOLATIONS BY RESPONDENT OF ARTICLE 2 (1) OF THE MANDATE AND ARTICLE 22 OF THE COVENANT

CHAPTER I

STATEMENT OF THE LAW

A. Introductory

1. In their Submission 5 Applicants request the Court to declare that: "the Union, by word and by action, in the respect set forth in Chapter VIII of this Memorial, has treated the Territory in a manner inconsistent with the international status of the Territory, and has thereby impeded opportunities for self-determination by the inhabitants of the Territory; that such treatment is in violation of the Union's obligations as stated in the first paragraph of Article 2 of the Mandate and Article 22 of the Covenant; that the Union has the duty forthwith to cease the actions summarised in Section C of Chapter VIII herein, and to refrain from similar actions in the future; and that the Union has the duty to accord full faith and respect to the international status of the Territory; [1]".

2. Applicants' contentions regarding Respondent's obligations in respect of the matters referred to in the aforegoing submission appear from the following stages in their reasoning in Chapter VIII of the Memorials [2] namely:

(a) Unilaterial annexation or incorporation of the mandated territory is:
   (i) *inconsistent* with "a basic legal premise of the mandate system", under which a "distinct international status" was accorded to the Territory, and a duty assumed by Respondent "to guide [the Territory] to a point at which the inhabitants thereof would become competent to determine their own future status" and
   (ii) *repugnant* to Article 2 of the Mandate which is to be construed as imposing on Respondent a duty, *inter alia*, to "provide for the political advancement of the inhabitants of the Territory...".

(b) On the part of Respondent there is accordingly a "duty to refrain from unilateral annexation", and a "duty to advance the political maturity of the Territory's inhabitants so that they may ultimately exercise self-determination . . .".

(c) The provision in the first paragraph of Article 2 of the Mandate, which confers on Respondent "full power of administration and legislation over the territory . . . as an integral portion of the Union of South Africa", must be construed in the light of the aforestated duties.

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[1] *Vide* I, p. 198.
[2] *Ibid.*, pp. 184-186.

(d) So construed, Article 2 of the Mandate does not entitle Respondent "to take unilateral action regarding the Territory if such action amounts to *de facto* annexation or incorporation". A contrary interpretation would "erase both the international status of the Territory and [Respondent's] duties as Mandatory".

(e) "Incorporation or annexation can take place through single political acts, such as a proclamation, or through gradual and erosive processes". With regard to the latter "motive is an important indicator since it sheds light upon the significance of individual actions, which might otherwise seem ambiguous".

3. On the basis of their Statement of Law as outlined in the aforegoing paragraph, Applicants, by reference to certain statements set forth in section B.1 of Chapter VIII of the Memorials and certain acts of Respondent, recounted in section B.2 of the said Chapter, charge Respondent with a violation of its alleged duties as set forth in paragraph 2 *(b)*, *supra*, namely to "refrain from unilateral annexation" and to "advance the political maturity of the Territory's inhabitants so that they may ultimately exercise self-determination".

4. Although Respondent contends that the Mandate has lapsed [1], a contention which, if upheld, will obviate an enquiry into the charges made by Applicants in Chapter VIII of their Memorials, Respondent nevertheless will in this and the following Chapters deal with Applicants' charges on the assumption, for purposes of argument, that the Mandate is still in force. It will be convenient to deal first with Respondent's duties in the respect alleged by Applicants, and thereafter with Applicants' statement relative to the kind of actions which would constitute a breach of such duties.

B. The Alleged "Duty to Refrain from Unilateral Annexation"

5. Respondent admits that it was a basic principle of the mandate system that the territories placed thereunder would each, during the existence of the particular mandate, have a distinct international status or identity.

On the assumption stated in paragraph 4 above, the position is accordingly accepted that in law Respondent is not entitled to annex or incorporate South West Africa unilaterally, or to commit an act which is inconsistent with the separate international status of the Territory.

6. At the same time, however, although it has a separate international status, South West Africa is one of the territories which, in terms of Article 22 of the Covenant, could ". . . be best administered under the laws of the Mandatory as integral portions of its territory . . ." subject to certain safeguards in the interests of the indigenous population [2]. And it is a territory in respect of which Respondent has, in terms of the Mandate, ". . . full power of administration and legislation . . . as an integral portion of the Union of South Africa . . ." and authority to ". . . apply the laws of the Union of South Africa to the territory, subject to such local modifications as the circumstances may require" [3].

[1] *Vide* Book II, Chap. V, of this Counter-Memorial.
[2] Art. 22 (6) of the Covenant.
[3] Art. 2 of the Mandate.

7. The only possible way of reconciling the existence of a separate international status for the Territory with the provisions of the Covenant and the Mandate cited above, is to accept that whilst the Territory *de jure* in international law enjoys a separate identity, the *de facto* relationship between the mandated territory and the Mandatory's own territory in the administrative and legislative fields may be one of close integration.

8. The position of South West Africa in international law is therefore that of a territory having a separate status, but at the same time a territory permitted to be closely integrated in the administrative and legislative spheres with another territory, namely that of the Mandatory [1].

This position in law must always be borne in mind when one considers the nature of Respondent's powers and duties in question.

As far as the status of the Territory is concerned, Respondent must respect the requirement that it is to be a separate international status. On the other hand, as far as the *de facto* government of the Territory is concerned, Respondent is authorized to perform all acts covering all facets of government, administration and legislation. The day-to-day exercise of the attributes of sovereignty thus vest in Respondent, and the powers of Respondent in the fields of administration and legislation are *practically* as wide as that of a sovereign power in regard to its own territory. The only limitations which fetter or condition the internal exercise of the powers of government and legislation are, firstly, the specific prohibitions contained in the Mandate, and, secondly, the duty to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory . . .". Subject to the observance by Respondent of the said prohibitions and of its duty towards the inhabitants, even complete integration of administration and legislation would be permissible, without infringing the separate international status of the Territory. A *de facto* relationship could thus legitimately develop, which in most respects would be indistinguishable from the *de facto* position obtaining under annexation or incorporation.

9. Viewed in the light of the foregoing considerations, the obligation to respect the separate international status of the Territory clearly cannot mean an obligation to maintain an entirely separate system of administration and legislation in respect of the Territory. Furthermore, no inference can be drawn that the said obligation entails a duty to sever the bonds of administration and legislation inter-territorially as time goes by. On the contrary the interests of the Territory and of the inhabitants may at particular stages be best served—as has in fact been the case regarding South West Africa—by progressive steps of closer association.

10. In the premises Respondent submits that its legislative measures and administrative acts, whether they do or do not involve closer integration of the Territory with the Republic of South Africa, cannot *per se* amount to a violation of the duty to respect the international

[1] Although both the status of the Territory as well as the form of government permitted for it are determined by international law, the former has often been seen as the international law relationship of the Territory (i.e., its position vis-à-vis the world), and the latter as its inter-territorial relationship (i.e., its position vis-à-vis South Africa—in so far as its *de facto* administration is concerned).

status of the Territory—or as Applicants put it, "to refrain from unilateral annexation". The only possible basis for establishing a violation in such respect would be to show that the actions in question amount to an abuse of powers, which, in the present context, could only mean that they are directed towards a purpose not authorized by the Mandate. Thus Applicants indeed allege that the purpose of the actions on which they rely was an unauthorized one, namely incorporation.

Briefly summarized, therefore, if the Mandate were still in existence, the legal position would be that Respondent is not entitled to take action *the purpose of which is unilateral incorporation or annexation* —whether intended to be accomplished by a single act or piecemeal. On the other hand, acts in the administration of the Territory, not directed towards a purpose to annex the Territory, cannot be in conflict with the duty to refrain from unilateral annexation—even if such acts bring about closer integration between the Territory and South Africa.

C. The Alleged "Duty to Advance the Political Maturity of the Territory's Inhabitants so that they May ultimately Exercise Self-Determination"

11. Nowhere in the Covenant or in the mandate instrument was specific provision made for an obligation in the above terms.

The Covenant, however, did provide in Article 22 for the application of "the principle that the well-being and development of (the inhabitants of mandated territories) form a sacred trust of civilization". And this principle found expression in Article 2 of the Mandate, viz.: "The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants."

12. It is conceded that in the wide and general "principle" enunciated in the Covenant, and expressed in the provisions of Article 2 of the Mandate, there was embraced the idea of political advancement of the peoples of mandated territories. What the ultimate goal of such political advancement would be in the case of B and C Mandates was nowhere stated. As a matter of inference, however, it can be conceded that *ultimate* self-determination was probably envisaged as an ideal in that regard—but then only in a qualified sense of being something that would be desirable to such extent and in such manner as might prove to be practicable and equitable, as part and parcel of performance by the Mandatory of the discretionary function entrusted to it by Article 2 of the Mandate. There is nothing to justify an inference of any more definite contemplation or intent regarding self-determination. Indeed, uncertainty or lack of agreement on the question whether development to a stage of self-determination would prove possible in all cases is in all probability the explanation for the omission to state anything express in this regard in the case of B and C Mandates. Similar considerations probably also explain why the authors of the mandate system refrained from prescribing the method by which the peoples in question should be advanced politically, or the stage of advancement which would be required for expression of self-determination, or the procedure to be followed therein.

13. It seems then that it was deliberately considered best to do nothing more than to entrust the political advancement of the inhabitants

of B and C Mandated territories to the discretion of the different Mandatory Powers as one of the objectives of the duty to promote the "material and moral well-being and the social progress" of such peoples.

The objective of political advancement is thus interwoven with all the other facets of well-being, and the manner of its promotion lies in the discretionary field. It was the Mandatory's intimate knowledge and experience in this field which, *inter alia*, motivated the grant of the Mandate to it in the first instance [1].

14. An important aspect of the discretionary nature of the Mandatory's task in the respect under consideration, and of the lack of precise prescription in that regard in the mandate system, is that the manner of achievement of the ideal of self-determination may have to differ as between various peoples and territories. Where a territory is "inhabited by a homogeneous people, self-determination could appropriately take the form of an act by or on behalf of *all the inhabitants* and with reference to *the whole territory*. But such a form could be wholly inappropriate, and could indeed defeat the whole object of self-determination, when applied indiscriminately to a case like that of South West Africa, where the inhabitants belong to separate and divergent population groups which are in substantially different stages of development, and which, to a large extent, are separated from each other in portions of the Territory claimed by individual groups as belonging to themselves, e.g., Ovamboland, the Okavango and the Eastern Caprivi. The very differentiation made in the mandate system between the cases of A, B, and C Mandates [2], demonstrates that the authors of the system contemplated and expected different rates of development as between the various peoples to which the system would apply, and different times at which they might attain political maturity. It therefore seems not only permissible for, but also incumbent upon, a Mandatory, in accordance with the basic premise of the mandate system, to find appropriate methods whereby, in a case like South West Africa, different population groups can as far as practicable attain self-determination relative to themselves without thereby frustrating self-determination for others.

15. The practical implications of the above distinction have been considered earlier in this Counter-Memorial, relative to the charges against Respondent made by Applicants in Chapter V of their Memorials, and need not again be considered here. The distinction is, however, to be borne in mind in order to preclude a wrong perspective upon the Mandatory's duties relative to the ideal of self-determination.

16. Another matter to which attention should be drawn is that the duty to promote political advancement does not mean that such promotion must necessarily have as its objective the ultimate independence of South West Africa.

Indeed the provisions of Article 22 (6) of the Covenant and Article 2 of the Mandate, read in the light of events before and at the drafting of the Covenant, indicate that the ultimate destination of South West Africa was not foreseen as being necessarily independence. As far as the "communities" mentioned in Article 22 (4) of the Covenant are concerned, the goal of independence was clearly stated. As regards the "peoples"

[1] Art. 22 (2) of the Covenant.
[2] Art. 22 (4), (5) and (6), respectively.

mentioned in Article 22 (5) of the Covenant, and the "territories" mentioned in Article 22 (6), nothing was expressly said on this point. Whatever the situation might be in regard to the former (the peoples of the so-called B Mandated Territories), there was in the case of the latter (the so-called C Mandated Territories) nothing on which an inference could fairly be based that the ultimate result was intended to be necessarily independence. It was clearly stated that such territories could best be administered ". . . under the laws of the Mandatory as integral portions of its territory . . ." and the reasons for that view as enumerated in Article 22 (6), were based on considerations which, in respect of the territories to which they applied, could largely be expected to be of a permanent nature—namely "the sparseness of their population, or their small size, or their remoteness from the centres of civilization, or their geographical contiguity to the territory of the Mandatory . . ."

17. Furthermore, as has already been stated, the Mandate for South West Africa specifically provided (as was the case in all C Mandates) that Respondent would have full power of administration and legislation over the territory "as an integral portion of the Union of South Africa".

Once a territory is administered "as an integral portion" of the Mandatory's territory, the tendency to closer integration would be automatic. The scales would thus probably, in the course of time, be weighted in favour of ultimate incorporation as the choice of the inhabitants.

That this natural tendency was foreseen, and that ultimate independence was not necessarily envisaged for South West Africa, is clear from the events at the drafting of the Covenant. In this respect Duncan Hall says:

> "The ultimate union of [South West Africa] with the mandatory would seem, President Wilson said, a 'natural union'. 'It was up to the Union of South Africa to make it so attractive that South West Africa would come into the Union of their own free will', and, he declared, 'if successful administration by a mandatory should lead to union with the mandatory, he would be the last to object.'
>
> *This and similar passages show that President Wilson did not take* the doctrinaire view that the 'natural end' of a mandate was independence, since what mattered was the 'true wishes' of the people; and these wishes, when they could be ascertained, 'might . . . perhaps lead them to desire their union with the mandatory power'. From this followed logically the President's adoption of the idea of the administration of 'C' mandates as an 'integral portion' of the mandatory's own territory. This wording was not something which the draft of January 30 forced him to accept against his will. Mr. *Lloyd George had thrown out the idea on January 24, but* the President was to make it his own on the 27th—two days before the draft text of Article 22 containing this provision was prepared by General Smuts. If South Africa were the mandatory, the President said on that day, it would extend its laws to South-West Africa, and 'administer it as an annex to the Union so far as consistent with the interests of the inhabitants' [1]."

And Lloyd George, as Respondent has already indicated, is reported to have said:

[1] Hall, H. D., *Mandates, Dependencies and Trusteeship* (1948), pp. 123-124.

"There is no doubt at all that South-West Africa will become an integral part of the Federation of South Africa. It will be colonised by people from South Africa [1]."

18. The basic principles of the Covenant and of the Mandate, it is submitted, would be entirely satisfied if an ultimate merger such as foreseen by the authors of the Covenant, were to take place.

There can accordingly be no validity in a charge that administrative and legislative steps towards closer integration between South West Africa and South Africa are in violation of the principles of the Covenant and the Mandate merely on the ground that such steps may influence the inhabitants in their choice as to the future of the Territory—that is if and when they attain political maturity.

19. Subject to the above considerations [2], it can be conceded that Respondent's duties under Article 22 of the Covenant and the Mandate included a duty to promote the political advancement of the inhabitants of South West Africa towards possible self-determination, and that unilateral incorporation during the existence of the Mandate could in a sense be said to involve also a violation of Respondent's duties in this respect.

In Respondent's submission, the same qualifying considerations as have been dealt with above apply also to the principles enunciated in Article 73 of the Charter of the United Nations relative to the political advancement of "peoples (who) have not attained a full measure of self-government" [3]—if that Article should be relevant at all in an enquiry as to Respondent's duties under the Mandate [4].

Like the Covenant of the League of Nations, the Charter envisaged self-determination as an ideal for such peoples, without stating a contemplation of the attainment thereof as a possibility in all cases. And like the Covenant, the Charter is silent as to the methods by which political advancement should be promoted, as well as to the stage of development required for the expression of self-determination or the procedure to be followed therein—all matters which by inference were left to the discretion of the Powers responsible for the administration of the territories to which Article 73 of the Charter was intended to apply.

20. In the premises aforestated, Respondent submits that no separate test can be applied to ascertain whether the duty to promote opportunities for progress towards possible self-determination has been violated. The test, it is submitted, must be whether a particular act complained of, when viewed against all the facets of well-being and development, wholly or in part frustrates the said objective.

Whenever an act is tested in order to ascertain whether it does or does not frustrate the said objective, such act may appear to be positive, or neutral (in the sense that it neither promotes nor impedes progress) or negative (in the sense that it constitutes an impediment as far as political advancement is concerned). In this regard it should be pointed out, however, that a particular act, when seen in isolation, may seem to involve some impediment to political advancement, but that, when

[1] Temperley, H. W. V., *A History of the Peace Conference of Paris* (1920-1924), Vol. III, p. 95.

[2] That is, as stated in paras. 11-18, *supra*.

[3] *Vide* Applicants' allegations in I, p. 184.

[4] *Vide* Respondent's reply to Applicants' Statement of Law in Chapter V of the Memorials.

viewed against the broad spectrum of all facets of well-being and progress—which is the proper test to be applied—it may indeed prove to be intended, and in fact to operate, for the advantage of the inhabitants of the Territory.

21. Respondent submits that the discretion in the formulation of proper policies directed towards the promotion of the well-being of the inhabitants, including their political advancement, vests in Respondent. This discretion is a wide one, the exercise of which, in Respondent's submission, is limited only by the requirement that the discretionary power must not be abused—which in this case, for all practical purposes, concerns only the limitation that such power is not to be exercised for a purpose not authorized by the Mandate.

The principles applicable in a consideration of this aspect have been fully dealt with elsewhere in this Counter-Memorial in answer to Applicants' legal submissions at the commencement of Chapter V of the Memorials, and need not be repeated here.

As long as Respondent observes the duty not to take action the purpose of which is unilateral incorporation or annexation [1], and complies with the obligation of promoting the political advancement of the inhabitants [2], a step towards closer administrative and legislative integration of South West Africa with South Africa, having as its object better government of the Territory, would not in law constitute a violation of Respondent's obligations under the Covenant or the Mandate.

D. Applicants' Statement that "the Phrase 'Integral Part' Gives [Respondent] no Licence to Take Unilateral Action regarding the Territory, if such Action Amounts to De Facto Annexation or Incorporation" [3].

22. What precisely Applicants contend for by this statement is not clear. In its wording the statement is not qualified with respect to purpose, motive or intent, and may accordingly be read as intended to apply not only to acts actuated by improper motives (i.e., acts of which the purpose is incorporation or annexation), but also to acts not so motivated but which have a particular effect, namely an effect of closer integration between South Africa and South West Africa.

On a reading of the whole of Chapter VIII of the Memorials, it would, however, appear as if this passage was intended by Applicants to be read subject to an implied consideration of motive, purpose or intent. Thus, for example, Applicants say:

(a) "Motive is an important indicator since it sheds light upon the significance of individual actions. which might otherwise seem ambiguous [4]."

(b) "... its [Respondent's] purpose is incorporation" and "The intent of [Respondent] ... has been given practical effect by, and explains, [its] action [5]".

(c) "[Respondent's] policy ... is ... part of a plan to incorporate the Territory politically [6]."

[1] As to which see paras. 5-10, *supra*.
[2] *Ibid.*, paras. 11-19.
[3] I, p. 185.
[4] *Ibid.*, p. 186.
[5] *Ibid.*, p. 189.
[6] *Ibid.*, p. 193.

(d) "The above two actions [of Respondent] are to be regarded as elements of the plan to incorporate the Territory into the Union . . .[1]"
(e) ". . . read in the light of the Union's avowed intent . . .[2]".

23. Respondent therefore takes Applicants' statement to mean that an act, the purpose of which is annexation or incorporation—whether intended to be accomplished in a single act or piece-meal—constitutes a breach both of the duty to refrain from annexation or incorporation, and of the duty to promote the progress of the inhabitants towards possible self-determination.

If this is what Applicants intend to convey in their Statement of the Law, then Respondent has no comment thereon save to say that:

(a) motive would not, as Applicants suggest, be only "an important indicator (shedding) light upon the significance of individual actions"—it would be the very criterion, and the only criterion, for determining whether a particular action is in violation of Respondent's obligations under the Mandate; and
(b) in considering the propriety of any act on the part of Respondent, due regard must be had to powers conferred on Respondent as Mandatory, as dealt with in paragraphs 6 to 10, *supra*, and to the considerations stated above, particularly in paragraphs 12 to 18, as bearing upon the concept of self-determination in the case of a C Mandated Territory like South West Africa.

24. If, however, Applicants' statement in question was not intended to be read subject to an implied consideration of purpose, motive or intent, then Respondent submits that in the light of what has been said in paragraphs 5 to 21 above, the statement advances a proposition which is wholly untenable in law.

25. In the following Chapters Respondent will deal with Applicants' Statement of Facts in the light of the legal contentions set forth by Respondent in this Chapter.

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[1] I, p. 194.
[2] *Ibid.*, p. 195.

CHAPTER II

RELEVANT HISTORICAL BACKGROUND

A. Generally As to the Facts Relied upon by Applicants

. Applicants commence their Statement of Facts by referring to Chapter II of the Memorials as setting forth—

> "... the long record of the Union's continuous assertions that the Mandate has lapsed, that the Union has no duties thereunder, and that the Union alone has a legal interest in the Territory [1]".

They proceed to allege, with reference to statements made in the South African Parliament over the years 1956 and 1957, that Respondent "claims a legal right to incorporate the Territory politically", that Respondent's "purpose is incorporation", and that Respondent "in furtherance of this purpose, avowedly treats as null and void the obligations stated in Article 22 of the Covenant and the Mandate which prohibit unilateral annexation and contemplate progress towards self-determination" [2].

Applicants allege further that Respondent's intent to incorporate the Territory "has been given practical effect by" certain acts dealt with in section B.2 of Chapter VIII of the Memorials, which acts are said to be "*inconsistent with the international status of the Territory*" [2].

2. Although Respondent admits that it has since, and by reason of, the dissolution of the League of Nations, contended that the Mandate had lapsed and that Respondent has the power to incorporate South West Africa (a matter dealt with more fully in Chapter III, paragraph 4, hereinafter), it denies that the other conclusions which Applicants draw from the statements and acts in question are justified. In particular Respondent denies that such statements or acts evidence an intention or purpose on its part to incorporate the Territory, or that the said acts served to give practical effects to such an intention, or that they were or are inconsistent with the international status of the Territory. Respondent also denies that, in furtherance of a purpose of unilateral annexation, it treats as null and void the obligations stated in Article 22 of the Covenant and in Article 2 of the Mandate.

3. In ascertaining Respondent's motives relative to the status of South West Africa and its relationship with South Africa, as well as its attitude towards the inhabitants of the Territory, due regard should be had to Respondent's conduct and declared intentions regarding the Territory and its peoples both during the lifetime of the League of Nations and thereafter.

A general account of relevant historical facts since the inception of the Mandate has been given in Book II, Chapter II, of this Counter-Memorial. In the following paragraphs of this Chapter a brief review is given of the more salient facts concerning Respondent's conduct and

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[1] I, p. 186.
[2] *Ibid.*, p. 189.

intentions as declared from time to time in the particular regards aforestated.

B. The League of Nations Period

4. The close relationship between South Africa and the mandated territory, which had indeed been contemplated by the authors of the Covenant as the probable and natural association between the two countries [1] became a reality from the inception of the Mandate, and a progressive desire for further integration was evidenced over the years.

As early as September 1920 General Smuts envisaged the following constitutional developments in South West Africa:

> "South-West Africa would always be a separate unit as a large country, but it was impossible to run it as a province at the present time, though later, no doubt, it would become one, with a Provincial Council and members in the House of Assembly, but first other stages would have to be passed through. The first would probably be an Advisory Council to be appointed to advise the Administrator. Not long after that, the Council would become an elected Council, and in due course there would be a full Parliamentary system [2]."

And a Commission appointed by Respondent in 1920 to enquire into the question of the future form of government in the Territory recommended, *inter alia*, as follows:

> ". . . the form of government . . . should be succeeded . . . by the form of government at present prevailing in the four Provinces of the Union, giving the population full representation in a Provincial Council and in the Union Parliament. When that stage has been reached, the Protectorate will be administered as a fifth Province of the Union, with a system of government similar in principle to that of the other parts of the Union, but subject always to the conditions of the Mandate [3]."

5. In 1923 General Smuts once more set out his views as to the constitutional future of the Territory. In a letter to the Chairman of the Permanent Mandates Commission he said, *inter alia*:

> "When the question of citizenship has been solved, we propose to constitute a legislative council for the territory to which, in addition to a number of Government nominees, the white voters of the territory will be able to elect a larger number of popular representatives. They will also in all probability be given the opportunity to send some representatives to the Union Parliament. This will, however, be without prejudice to the interests of the native population, which will continue to be a charge of the Union Government as the mandatory Power. In all other respects the terms of the mandate will be safeguarded and respected in the legislation which will be introduced, and the Union Government will continue to discharge its responsibilities in accordance with the mandate. These arrangements for the future government of the territory without

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[1] *Vide* Chap. I, para. 17, *supra*.
[2] *P.M.C., Min.*, II, p. 92 (Annex 6).
[3] *U.G.* 24—1921, para. 7, p. 4.

prejudice to the provisions of the mandate will, I am sure, commend themselves to the Permanent Mandates Commission [1]."

6. Due to political currents in the Territory, the close relationship between it and South Africa was emphasized on several occasions, and the desire of the majority of the European inhabitants for closer association, which was always present, became more insistent from time to time. One of the strong motivating factors for this desire was reaction against expressed aspirations of the German section of the community to see the Territory returned to German rule [2].

7. The Permanent Mandates Commission also, on occasion, discussed the agitation for closer association, although no formal proposal for incorporation of South West Africa as a fifth province of the Union, or otherwise, was ever made [2].

During the Sixth Session of the Commission [3] the question was discussed with reference to certain statements and articles which had appeared in the Press. The South African representative, Mr. Smit, said, *inter alia*:

> "When South-West Africa had a responsible Government, that Government might probably be invited to join the Union. Under the Union Act, South-West Africa would then become a province of the South African Union, but it would remain, for certain purposes, a distinct entity [4]."

And M. Rappard is recorded as having said that:

> ". . . in such an event it would be necessary to respect two essential principles. The first was that the territory must continue to be administered on behalf of the League of Nations. The second principle was that its administration must be wholly disinterested, which meant that no excess of revenue from the mandated territory should be used except for the benefit of the territory. *It seemed to him that there could be no objection to incorporation provided these principles were safeguarded* [4]." (Italics added.)

After others had participated in the discussion M. van Rees pointed out that:

> ". . . under Article 22 of the Covenant and according to the terms of the C mandates, it was provided that the Mandatory should have full power of administration and legislation over the territory as an integral portion of the territory of the Mandatory. *There could accordingly be no objection to incorporation if it were merely a question of administrative incorporation, subject to the special obligations of the mandatory Power.* If, however, incorporation would imply a change in the political and international status of South-West Africa without this territory having yet reached a sufficiently high state of development to allow the Mandatory to withdraw, such incorporation would amount, without doubt, to annexation, which would be an obvious infraction of the mandatory system [5]." (Italics added.)

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[1] *P.M.C., Min.*, III, p. 215 (Annex 1).
[2] *Vide* Book II, Chap. II, para. 26, of this Counter-Memorial.
[3] 26 June to 10 July 1925.
[4] *P.M.C., Min.*, VI, p. 59.
[5] *Ibid.*, pp. 59-60.

8. During the Ninth Session of the Permanent Mandates Commission [1], a statement by General Smuts, who was then no longer a member of Respondent's Government, was brought to the notice of the Commission. General Smuts had said, *inter alia*:

> "I should have preferred the two countries more closely linked up at this stage. When I urge this it may be said that I am working in favour of the annexation of South-West Africa to the Union; but I am not. I do not think it is necessary for us to annex South-West to the Union. The mandate . . . gives the Union such complete power of sovereignty, not only administrative, but legislative, that we need not ask for anything more."

And:

> "When the Covenant of the League of Nations and, subsequently, the Mandate gave to us the right to administer that country as an integral portion of the Union, everything was given to us. . . . We therefore have the power to govern South-West Africa actually as an integral portion of the Union. Under these circumstances I maintain—and I have always maintained—that it will never be necessary for us, as far as I can see, to annex South-West. We can always continue to fulfil the conditions imposed on us by the mandate, and we can always render annual reports to the League of Nations in respect of the mandate [2]."

In the course of discussion on General Smuts' statement, M. Rappard is recorded as having said that:

> "General Smuts was perfectly free to state that an integral part of the territory of South Africa was administered in the name of the League of Nations, although . . . it would appear more logical to say that it was administered in the name of the League of Nations as if it formed an integral part of the territory [South Africa] [3]."

9. In 1934 the then Prime Minister of South Africa, General Hertzog, made the following statement regarding Respondent's attitude towards the Mandate:

> "The Government has not the least intention in relation to the mandate for South-West Africa to act otherwise than faithfully to carry out its duties as Mandatory and to continue to perform them until such time as the object which was contemplated when the mandate was handed over to us has been attained, and I hope we shall accept that as a fixed policy and decision, not only of the present Government, but of any Government that succeeds it [4]."

10. During 1934 the Legislative Assembly of South West Africa adopted a resolution which urged, *inter alia*, that South West Africa ". . . be administered as a fifth province of the Union, subject to the provisions of the . . . Mandate", and that the Territory be represented in the South African Parliament [5].

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[1] 8 to 25 June 1926.

[2] *P.M.C., Min.*, IX, p. 33. *Vide* also *U. of S.A., Parl. Deb., House of Assembly*, Vol. 5 (1925), Cols. 5930-5931.

[3] *P.M.C., Min.*, IX, p. 34.

[4] As quoted in *P.M.C., Min.*, XXVI, p. 51.

[5] This resolution was passed on 22 May 1934, but was later considered invalid

In the Twenty-Sixth Session of the Permanent Mandates Commission, during 1934, the said resolution was discussed. There were divergent reactions from various Members of the Commission as to the propriety of administering the Territory as a fifth province of the Union with representation in the Union Parliament, the majority indicating in the course of discussion that they were individually inclined to regard such an arrangement as incompatible with the Mandate[1]. The Commission's resolution, however, was to—

> "... [reserve] its opinion as to the compatibility of the course proposed by the Legislative Assembly with the mandate system until it had been informed in due course of the point of view adopted by the mandatory Government in this connection and been acquainted with all the factors of the problem[2]".

11. Respondent's reaction to the aforementioned resolution of the Legislative Assembly was that it would take no action without consulting with the League of Nations. The matter was brought specifically to the attention of the Permanent Mandates Commission in 1935, when the South African representative informed the Commission of the appointment of the South West Africa Commission (known informally as the Constitution Commission)[3]. He explained the terms of reference of the Commission as well as the reasons for its appointment, and assured the Mandates Commission that:

> "... the Union Government had acted and would continue to act in a spirit of complete loyalty towards the Mandates Commission. In any case there was absolutely no intention of presenting the Commission with a *fait accompli*.
>
> Nothing could be further from the Union Government's thoughts that any intention to take any action that would stultify its position in the eyes of the Mandates Commission or of the Members of the League of Nations, of which the Union Government was a staunch Member. He could assure the Mandates Commission that the Union Government would never take any action in this respect until it had first communicated its intentions to the Mandates Commission itself[4]."

In its report to the League Council the Permanent Mandates Commission—

> "... noted with satisfaction the statement by the accredited representative that the mandatory Power will not take any action in this respect until it has first communicated its intentions to the League of Nations[5]".

12. In its report, the South West Africa Commission expressed the opinion that there was no legal objection to the administration of South West Africa as a fifth province of the Union, subject to the terms of the Mandate. Copies of the Commission's report were submitted to the

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on constitutional grounds. A similar resolution was thereafter again proposed and adopted on 29 Nov. 1934. *Vide U.G.* 26—1935, pp. 5, 7.

[1] *P.M.C., Min.*, XXVI, pp. 50-52, 62-64, 163-166.

[2] *Ibid.*, p. 166.

[3] *Vide* Book II, Chap. II, para. 27, of this Counter-Memorial.

[4] *P.M.C., Min.*, XXVII, p. 160.

[5] *Ibid.*, p. 229 (Annex 36).

League of Nations, and in the annual report for the year 1936 Respondent communicated to the League its views on the Commission's findings. Respondent stated, *inter alia*:

> "Although the Union Government is of the opinion that to administer the Mandated Territory as a fifth Province of the Union, subject to the terms of the Mandate, would not be in conflict with the terms of the Mandate itself, it feels that sufficient grounds have not been adduced for taking such a step [1]."

C. The Period After the Dissolution of the League

13. The facts relating to Respondent's attitude and intentions with regard to the Mandate at the time of the inception of the United Nations Organization and the dissolution of the League of Nations, have been set out in Book II, Chapter II, of this Counter-Memorial, and need not be repeated here in detail. For convenience, however, the following more important facts are briefly recapitulated, viz.:

(a) The desire amongst the European inhabitants of the Territory for closer association with South Africa and termination of the Mandate found concrete expression in repeated resolutions passed by the South West Africa Legislative Assembly [2].

(b) Consultations with the non-White inhabitants of South West Africa in order to ascertain their wishes regarding the future government of the Territory resulted in an overwhelming majority in favour of incorporation [2].

(c) Apart from the expressed wishes of the inhabitants, numerous other considerations rendered incorporation advisable [3].

(d) Respondent believed that incorporation would serve the best interests of South West Africa and all its inhabitants, and had at all material times made known its project for ascertaining the wishes of the inhabitants and thereupon seeking to obtain international recognition for incorporation [4]. The procedure actually followed in this last respect was the submission to the General Assembly of the United Nations of a fully reasoned memorandum and proposal in that regard [5].

(e) The General Assembly, however, rejected Respondent's proposal regarding incorporation, whereupon Respondent made it clear that it would not proceed with incorporation of South West Africa, but would maintain the *status quo* and continue to administer the Territory in the spirit of the Mandate [6].

14. Although Respondent had, in deference to the wishes of the General Assembly, relinquished the project for incorporation of South West Africa, all the considerations relied upon by Respondent in proposing incorporation remained of full force and effect, and fully justified Respondent's bona fide belief that *closer association* between South West

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[1] *U.G.* 31—1937, para. 10, p. 4.
[2] *Vide* Book II, Chap. II, para. 43, of this Counter-Memorial.
[3] *Ibid.*, para. 45.
[4] *Ibid.*, paras. 31, 35 *(e)* and 41 *(b)* (ii).
[5] *Ibid.*, paras. 43-46.
[6] *Ibid.*, paras. 44, 47-48.

Africa and South Africa, *without the Territory being incorporated in South Africa*, would be in the best interests of the Territory.

15. On 11 April 1947 the House of Assembly of the South African Parliament adopted a resolution reading, *inter alia*, as follows:

> ". . . therefore this House is of opinion that the territory should be represented in the Parliament of the Union as an integral portion thereof, and requests the Government to introduce legislation, after consultation with the inhabitants of the territory, providing for its representation in the Union Parliament . . .[1] ".

This resolution was brought to the attention of the Secretary-General of the United Nations by letter of 23 July 1947, in which letter it was also stated that Respondent would maintain the status quo and would continue to administer the Territory in the spirit of the Mandate [2].

16. When the question of South West Africa was being considered by the General Assembly in 1947, the South African representative repeated Respondent's declared policy to administer South West Africa in the spirit of the Mandate, and stated, *inter alia*:

> "The representation of the Territory in the Parliament of the Union of South Africa, to which some attention has been drawn in the Fourth Committee, will not be a departure from such a form of administration. Under the Mandate, such representation could clearly have been granted without in any way violating any provision of the Mandate. It is not the same thing as incorporation, as has been contended by some representatives. By such representation, the Territory will not be incorporated in the Union of South Africa any more than the territories under French administration have been incorporated into France by representation in the French legislature. Also, after such representation has been granted, the Territory will continue to be administered in the spirit of the Mandate [3]."

17. The South African representative in 1948 again dealt in the Fourth Committee with the matter of closer integration of South West Africa with South Africa. He said that full political and economic advancement of South West Africa could not be achieved except through close association with South Africa in view of the fact that the interests of the contiguous Territories were so closely interwoven, and in many cases identical. And he pointed out that a closer form of political and economic association between the two Territories had indeed for many years been the desire of the people of South West Africa. After explaining the provisions of the proposed legislation whereby South West Africa would be represented in the South African Parliament, he said:

> "As the Prime Minister had pointed out, the new arrangement was not incorporation. On the contrary, South West Africa would now acquire self-government in a measure not permitted to the corresponding legislative bodies of the Provinces of the Union. The agreement arrived at was particularly advantageous to the Territory

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[1] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 60 (1947), Col. 2624. The full text is quoted in Book II, p. 56 **(I)**, of this Counter-Memorial.

[2] *Vide U.N. Doc.* A/334, in *G.A., O.R., Second Sess., Fourth Comm.*, p. 135 and Book II, p. 55 **(I)**, of this Counter-Memorial.

[3] *G.A., O.R., Second Sess.*, Vol. I, 105th Plenary Meeting, 1 Nov. 1947, p. 633.

of South West Africa, and was very definitely in the interests of the Territory and its people [1]."

18. Later in the same year the South African representative is recorded to have stated that he—

"... wished to give the Assembly the formal assurance, as had already been done by his Prime Minister, that the measures designed to establish Parliamentary representation for the Territory did not mean that Territory's incorporation or absorption into the Union of South Africa [2]."

And the General Assembly, in resolution 227 (III) of 26 November 1948, took note of—

"... the statement of the representative of the Union of South Africa that it is the intention of his Government to continue to administer South West Africa in the spirit of the Mandate;"

and of—

"... the assurance given by the representative of the Union of South Africa that the proposed new arrangement for closer association of South West Africa with the Union does not mean incorporation and will not mean absorption of the Territory by the Administering Authority; [3]".

19. By letter dated 11 July 1949, a copy of the South West Africa Affairs Amendment Act, 1949 (Act No. 23 of 1949), together with a summary of its provisions, was transmitted to the Secretary-General of the United Nations. This letter contained a reaffirmation of the aforesaid assurances, and continued:

"This Act introduces certain changes in the form of association between South West Africa and the Union of South Africa. In particular, it will be noted from the summary that under the new form of association, which is entirely consonant with the spirit of the Mandate, no greater powers are devolved upon the Union Government in respect of South West Africa than were accorded under the terms of the original Mandate, but on the other hand certain powers previously exercised by the Union Government are now to be exercised by the Legislature of South West Africa, which thus exercises a considerably greater measure of self-government than is enjoyed by a Province of the Union [4]."

In the course of debates in the Fourth Committee in the same year Respondent's representative assured the Committee that—

"... his Government had never contemplated adopting measures contrary to the provisions of the Mandate and that it was still administering the territory in the spirit of the Mandate [5]".

20. At the end of the debate of the Fourth Session of the Fourth Committee in 1949, one of the delegates proposed an amendment to certain draft resolutions to the effect that—

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[1] *G.A., O.R., Third Sess., Part I, Fourth Comm.*, 76th Meeting, 9 Nov. 1948, p. 293.
[2] *Ibid.*, 164th Plenary Meeting, 26 Nov. 1948, p. 588.
[3] *G.A. Resolution* 227 (III), 26 Nov. 1948, in *U.N. Doc.* A/810, pp. 90-91.
[4] *U.N. Doc.* A/929, in *G.A., O.R., Fourth Sess., Fourth Comm., Annex*, p. 8.
[5] *G.A., O.R., Fourth Sess., Fourth Comm.*, 130th Meeting, 21 Nov. 1949, p. 213. *Vide* also Book II, Chap. II, para. 55, of this Counter-Memorial.

"... the measures taken by the Union of South Africa in adopting a law for the association of South West Africa with the Union of South Africa constitute a violation of the United Nations Charter [1]".

This amendment was rejected in the Fourth Committee by 17 votes to 12 with 17 abstentions [1]. Again in 1950 the following amendment was proposed by the same delegation in the Fourth Committee:

"... that the action of the Union of South Africa in adopting a law on the incorporation of South West Africa in the Union of South Africa constitutes a violation of the Charter of the United Nations; [2]"

This proposed amendment was rejected by 16 votes to 9 with 22 abstentions [3], and an identical amendment proposed at the Fifth Plenary Session of the General Assembly on 13 December 1950, was once more rejected, by 24 votes to 8, with 22 abstentions [4].

21. In its negotiations with the *Ad Hoc* Committee on South West Africa during 1951 and 1952, Respondent expressed its preparedness to negotiate a new international instrument embodying in essence the main obligations of the Mandate [5]. Such an agreement, if concluded, would of necessity have precluded unilateral annexation or incorporation of South West Africa by Respondent.

22. In 1954, before the Fourth Committee, Respondent's representative dealt with certain charges of alleged incorporation and annexation of South West Africa. Commenting on the transfer of control over Native Affairs from the Administrator of South West Africa to the Minister of Native Affairs of the Union of South Africa, he emphasized that it would not result in the abolition or diminution of any service rendered to South West Africa. On the contrary, with its greater resources in money, manpower and experience, the Government of South Africa would be able to increase and to improve those services in every way. Furthermore, the South West Africa Administration and the Ministry of Native Affairs were both agencies of the South African Government and it was therefore difficult to understand how the South African Government would be less mindful of its responsibilities under Article 22 of the Covenant while acting through one than while acting through the other. He mentioned that the charges of alleged incorporation and annexation of South West Africa by the Union of South Africa had been heard before and rebutted in detail. Nevertheless they had been raised again, and he therefore wished to stress "that there had been no incorporation of South West Africa by the Union and no annexation to the Union [6]."

23. During 1955 Respondent's representative, in the course of a full statement before the Fourth Committee once more repudiated allegations to the effect that Respondent intended to incorporate the Territory, and stated that:

"It was the conviction of the South African Government that

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[1] *U.N. Doc.* A/1180, in *G.A., O.R., Fourth Sess., Plenary Meetings, Annex*, p. 100.
[2] *U.N. Doc.* A/1643, in *G.A., O.R., Fifth Sess., Annexes*, Vol. I (Agenda Item 35), p. 8.
[3] *Ibid.*, p. 9.
[4] *G.A., O.R., Fifth Sess.* Vol. I, 322nd Plenary Meeting, 13 Dec. 1950, p. 631.
[5] *Vide* Book II, Chap. II, paras. 70, 74 and 82, of this Counter-Memorial.
[6] *G.A., O.R., Ninth Sess., Fourth Comm.*, 407th Meeting, 15 Oct. 1954, pp. 69-70.

representation of South West Africa in the Union Parliament was fully in keeping with the spirit of the Mandate [1]."

24. In the course of negotiations with the Good Offices Committee on South West Africa during 1958, Respondent expressed its preparedness—

> ". . . to see incorporated in any agreement which might be arrived at a provision specifying that the Territory possessed 'an international character', in that it had not been annexed by the Union of South Africa in the generally accepted sense of the term; that this international character derived from the arrangement made at the Peace Conference at Versailles; and that the Union would not be able to amend the international character of the Territory unilaterally, that is to say, without the consent of the second party to the agreement [2]."

This expression of preparedness on Respondent's part, as well as expressions such as mentioned in paragraph 21 above, it is submitted, corroborate the consistent and frequent assurances by Respondent's representatives to the effect that Respondent had no intention to annex or incorporate the Territory.

25. During a meeting of the Fourth Committee on 8 October 1959, Respondent's representative, South Africa's Minister of External Affairs, once more assured the Committee that Respondent "would continue to administer the Territory in the spirit of the previous Mandate" [3].

D. Conclusion

26. In Respondent's submission the aforegoing account of history since the inception of the Mandate clearly shows that:

(a) during the lifetime of the League of Nations Respondent's declared attitude was that, with regard to the status of South West Africa as a mandated territory, Respondent would do nothing in conflict with the Mandate, or without prior consultation with the League; and

(b) whilst Respondent had after the dissolution of the League adopted the attitude that the Mandate had lapsed, Respondent, after rejection of its proposal regarding incorporation of South West Africa, consistently declared that it would not proceed with annexation or incorporation, that it would maintain the status quo and continue to administer the Territory "in the spirit of the Mandate". At the same time Respondent demonstrated its belief that steps towards closer association between South West Africa and South Africa would be to the benefit of the Territory and indicated that it was indeed desired by the inhabitants. Respondent furthermore showed that such steps as were taken in the direction of closer association were legally permissible under the Mandate and did not constitute incorporation, or elements in a plan or scheme of incorporation.

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[1] *G.A., O.R., Tenth Sess., Fourth Comm.*, 491st Meeting, 31 Oct. 1955, pp. 135-136.

[2] *U.N. Doc.* A/3900, in *G.A., O.R., Thirteenth Sess., Annexes* (Agenda Item 39), para. 33, p. 6.

[3] *G.A., O.R., Fourteenth Sess., Fourth Comm.*, 900th Meeting, 8 Oct. 1959, para. 15, p. 85.

CHAPTER III

RESPONDENT'S ALLEGED INTENTIONS

A. Introductory

1. This Chapter deals with that part of the Applicants' Statement of Facts set out in section B.1 of Chapter VIII of the Memorials under the heading *"The avowed intentions of the Union"* [1], and which is concerned almost exclusively with statements made in debates in the South African Parliament.

2. Respondent submits that with a view to a proper interpretation and evaluation of the statements concerned they require to be read in the light of their own context and setting, and also of Respondent's attitude, actions and declared intentions regarding South West Africa and its peoples, both before and after the statements in issue were made —as recounted in Chapter II above. When this is done—as in the following paragraphs—it will in Respondent's submission be seen that the statements do not justify the conclusions drawn from them by the Applicants, namely:

(a) that Respondent's "purpose is incorporation"; and

(b) that in furtherance of such purpose, Respondent "avowedly treats as null and void the obligations stated in Article 22 of the Covenant and the Mandate, which prohibit unilateral annexation and contemplate progress toward self-determination" [2].

B. The Statement of the South African Prime Minister in the Senate on 21 May 1956 [3]

3. Before the Prime Minister made the statement here in issue, Senator Cowley, a member of the Opposition in the South African Parliament, had suggested that it might be advisable for South Africa to annex South West Africa, and had presented an argument to justify such a course [4]. This was, in effect, an invitation to Respondent's Government to state its position regarding the question of incorporation or annexation of the Territory. The Prime Minister indeed commenced his reply to Senator Cowley by stating:

> "The hon. Senator Cowley suggested that in order to avoid troubles in future in so far as South West Africa is concerned, we should forthwith proceed to annex South West Africa [5]."

The cardinal aspect of the answer of the Prime Minister which then followed, was that it rendered clear that he did not agree with Senator Cowley's suggestion. He restated Respondent's attitude and views as to

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[1] I, pp. 186-189.

[2] *Ibid.*, p. 189.

[3] *U. of S.A., Parl. Deb., Senate*, Vol. III (1956), Cols. 3631-3632; cited in I, p. 186.

[4] *U. of S.A., Parl. Deb., Senate*, Vol. III (1956), Cols. 3627-3628.

[5] *Ibid.*, Col. 3631.

the relationship between South Africa and the Territory as a result of the dissolution of the League of Nations [1], and at the same time reiterated that Respondent would continue "to govern South West Africa in the spirit of the old mandate". While in effect conceding the possibility that circumstances might in future move Respondent to form an intention to incorporate the Territory, the Prime Minister made it clear that that was, as at the time of speaking, a mere contingency which had in fact not arisen.

4. With regard to the declaration contained in the statement that it was "within [Respondent's] power to incorporate South West Africa as part of the Union", it seems manifest that this was based on the understanding that the Mandate had lapsed—a contention which had repeatedly been advanced before by Respondent, and which is argued in Book II, Chapters III to V of this Counter-Memorial. Respondent has never taken up the attitude that if the Mandate should still be in force, Respondent would nevertheless have the right to incorporate the Territory unilaterally and without special justification. Respondent's policy to administer the Territory "in the spirit of the Mandate" includes a voluntary abstention from unilateral incorporation, exactly as if the Mandate were still in legal operation in that regard. And thus Respondent has in fact not taken any action to incorporate the Territory. It is submitted, therefore, that the declaration as to a *right* to incorporate does not show the existence of an *intention* on Respondent's part to incorporate the Territory, and that the very statement in which the declaration occurred refuted the existence of any such intention.

C. The Speech of Mr. Basson in the House of Assembly on 23 April 1956 [2]

5. On a proper analysis of Mr. Basson's speech, the following appears:

(a) With regard to the position of South West Africa, Mr. Basson visualized two separate problems, namely *on the one hand*,

"... the international problem, the legal position of South West *vis-à-vis* the world; [3]" *and, on the other hand*,

"... the inter-territorial relationship, i.e., the practical relationship between South West and the Union [4]."

(b) He regarded such questions as whether the Mandate still existed, with whom the sovereignty of South West Africa rested, and whether the powers of the League with regard to mandated territories had automatically been transferred to the United Nations or not, as falling under the international problem—a discussion of which in the House of Assembly and on the party political platform, he considered would not serve much purpose.

(c) Under the second problem he dealt not with the legal but with the practical relationship between the Territory and South Africa. He emphasised that Respondent always had the right to govern South West Africa as an integral portion of the Union, and said that:

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[1] *Vide* Chap. II, paras. 13-25, *supra*.

[2] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 91 (1956), Cols. 4107-4110; cited in I, pp. 187-189.

[3] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 91 (1956), Col. 4108; I, p. 187.

[4] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 91 (1956), Col. 4108; *vide* Chap. I, para. 8, *supra* (footnote 3).

> *"Within the rights and powers the Union has always had in respect of South West*, South West has in fact, *de facto*, become a partner of the four provinces, the fifth unit in the broad framework of South Africa, *and on a basis best fitting the political, economic and geographic circumstances of that territory* [1]." (Italics added.)

6. There can be no question but that Mr. Basson, speaking as a Member of Parliament for one of the South West African constituencies, saw Respondent's measures of integration not only as *inter-territorial* measures permissible in terms of Article 2 of the Mandate, but also as being beneficial to South West Africa itself. Furthermore, he rendered clear that he was dealing with the broad effect of "all the happenings of 1948-1949 . . . *not internationally but only inter-territorially*" [2] (italics added), and he manifestly did *not* suggest that any measures were to be seen as motivated by a desire to bring about a modification in the *international status* of the Territory, or as directed at stultification of the objectives contained in the second paragraph of Article 2 of the Mandate regarding the promotion of the well-being of the inhabitants. He was concerned with a totally different question—of no consequence for present purposes, but apparently regarded by him as important in domestic politics at the time—viz., whether the arrangements of 1948-1949 could be said to have made South West Africa "a partner of the four provinces", his answer being in the affirmative as regards the "*de facto*" situation.

7. In the above context it is clear that no sinister meaning can be attached to Mr. Basson's statement concerning the practical relationship between South West Africa and South Africa, namely that: ". . . annexation in the old-fashioned sense of the word has lost all *practical* meaning [1]." (Italics added.) It accords with views expressed since the inception of the mandate system by commentators who regarded the potential effect of C Mandates in their practical operation as one not far removed from the position obtaining under annexation [3], and it was, indeed intended to demonstrate that no particular purpose was to be served by complete annexation or incorporation.

D. The Statement of the South African Prime Minister in the House of Assembly on 23 April 1956 [4]

8. This statement of the Prime Minister must be read in its proper context. It was made in reply to the speech by Mr. Basson which is dealt with in paragraphs 5 to 7, *supra*.

Mr. Basson referred to the Legislative Assembly elections in South West Africa during November 1955, which elections he said had been fought "on the question of the political relations between South West Africa and the Union" [5], a matter with regard whereto he wished to give a report concerning "the final attitude and the wishes of the public of South West" [6].

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[1] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 91 (1956), Col. 4109.
[2] *Ibid.*, Cols. 4103-4109; *vide* Chap. I, para. 8, *supra* (footnote 3).
[3] *Vide* Book II, Chap. II, para. 8, of this Counter-Memorial.
[4] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 91 (1956), Col. 4128.
[5] *Ibid.*, Col. 4107.
[6] *Ibid.*, Col. 4108.

Having addressed the House of Assembly as cited by Applicants at I, pages 187 to 189, Mr. Basson concluded his speech as follows:

> "We therefore ask the Government that it should not count against us that our relationship to the central authority differs technically from the relationship between the four provinces and the central authority. We consider that this does not derogate from the quality of our partnership and our essential unity with the Union. It is our friendly request that we should be regarded not as being alien, not as something outside the Union which it is hoped one day to incorporate, but as a full partner of the four provinces on the basis of the 1949 Act [1]."

9. It seems clear that the Prime Minister's statement cited at I, page 189 was made in response to Mr. Basson's request that South West Africa "should be regarded not as being alien". The Prime Minister agreed with Mr. Basson that there was a strong desire in South West Africa for greater co-ordination between the Territory and South Africa in respect of legislation and other matters, and stated that representations had been made to his Government to that effect. The last sentence of the Prime Minister's statement, viz.: "I just want to emphasize that South West is no longer a mandated territory, but is ruled as an integral part of the Union [2]", in the context, was intended to give an assurance that although Respondent considered the Mandate to have lapsed—i.e., that "South West (was) no longer a mandated territory"—Respondent was governing, and would continue to govern, the Territory as an integral part of South Africa.

10. Applicants contend that the Prime Minister's statement—

> ". . . admits explicitly that the Mandate, if considered to be in effect, limits the manner in which the Union may rule the Territory as an 'integral part' of the Union.",

and that it ". . . reveals the Union's awareness that its actions . . . exceed the permissible bounds of the Mandate, if the Mandate is still effective . . .[3]"

Respondent says that this interpretation is an untenable one.

It will be recalled that the Prime Minister endorsed Mr. Basson's speech, and that Mr. Basson had made it quite clear that he was *not* dealing with the Territory's position in international law, but only with the inter-territorial relationship between the Territory and South Africa, and that he (Mr. Basson) had stated that a close inter-territorial relationship had developed *"Within the rights and powers the Union has always had in respect of South West* [4]". (Italics added.)

In endorsing such a statement, it is inconceivable that the Prime Minister would, in the same breath, have intended to convey an ". . . awareness that [Respondent's] actions . . . exceed[ed] the permissible bounds of the Mandate, if the Mandate [was] still effective . . .[4]"

11. It must be noted, furthermore, that if, as Applicants contend, the Prime Minister meant that Respondent was exercising powers beyond those permissible under the Mandate, the Prime Minister's statement

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[1] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 91 (1956), Col. 4110.
[2] *Ibid.*, Col. 4128.
[3] I, p. 187.
[4] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 91 (1956), Col. 4109.

would have been in direct conflict with the attitude consistently adopted and expressed by Respondent both before and after this statement [1].

Indeed, less than a month after making the statement here in issue, the Prime Minister, in the statement dealt with in paragraphs 3 and 4, *supra*, said that Respondent was "... prepared ... to govern South West Africa *in the spirit of the old mandate* [2]."

And a year later, in a statement also quoted by Applicants [3], the Prime Minister emphasized that—

> "... although we adopt the standpoint ... that the mandate no longer exists, the mandate itself laid down ... that the Union had the right to govern South West Africa as an integral part of the Union. We can, for example, make all our laws of application to it and govern it simply as part of the Union ..."[4]

thereby clearly indicating that Respondent regarded its actions in regard to the Territory as falling within the permissible bounds of the Mandate.

E. The Statement of the South African Prime Minister in the Senate on 14 June 1957 [5]

12. What the Prime Minister intended to convey in this statement must be gleaned from the discussions on the matter debated in the Senate at that time. The measure under discussion was an enactment concerning a purely administrative matter, namely the publication of laws of the Union Parliament which were applicable also in South West Africa. The Prime Minister explained that at the request of the South West Africa Administration the enactment in question provided that laws such as aforementioned would be published only in the Government Gazette of the Union of South Africa without republication in the Official Gazette of South West Africa. He explained that the reasons for such a step were the saving of costs as well as expediency in cases where legislation had to be applied urgently, and concluded as follows:

> "The South West Administration also gives the assurance that the Union *Government Gazette* will be circulated and used in such a way in South West Africa that publication therein of the laws of the Union Parliament which are of application to that territory will come quite adequately under the attention of people who are interested therein. The South West Administration will nevertheless publish a short notice in such cases in their own local official paper in order to direct attention to the fact that such a law was passed and that it is of application to the South West African territory [6]."

13. In the course of the debate Senator Conradie, a member of the Opposition, said:

> "Mr. President, I would like to assure the hon. the Minister that we will give him our full support. This Bill is simply to bring the po-

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[1] *Vide* Chap. II, paras. 13-25, *supra*.
[2] *U. of S.A., Parl. Deb., Senate*, Vol. III (1956), Col. 3632.
[3] I, p. 189; dealt with in paras. 12-14, *infra*.
[4] *U. of S.A., Parl. Deb., Senate*, Vol. IV (1957), Col. 5535.
[5] *Ibid.*, cited in I, p. 189.
[6] *U. of S.A., Parl. Deb., Senate*, Vol. IV (1957), Col. 5533.

sition in South West into conformity with the position as we have it today in the Union, as the hon. the Minister said. There is only one remark that I want to make and that is with regard to Clause *Four*. As the hon. the Prime Minister said, it is at the request of South West Africa that the laws should be published only in the Union *Government Gazette* and no longer in the official publication of South West. The hon. the Prime Minister said that there are cases where this is urgent and for that reason it is very much quicker to publish it here. There is one matter that strikes me, namely whether this is a step to incorporate South West further in the Union and no longer to keep the South West Administration, its legislation and its publications separate? I said that we welcome the Bill, but I would just like to point out that it appears to me as though this is a step towards further incorporation and if I understand it in this way, then, I think, we all do [1]."

The Prime Minister answered as follows:

"Mr. President, if I may just reply to the question which was asked—*I do not think that it has anything to do with this*, but the hon. Senator Conradie will know that although we adopt the standpoint which his former leader, General Smuts, adopted that the mandate no longer exists, *the mandate itself laid down to the old League of Nations that the Union had the right to govern South West Africa as an integral part of the Union*. We can, for example, make all our laws of application to it and govern it simply as a part of the Union and then the hon. Senator Conradie if he so prefers can still adopt the standpoint that it is not incorporated [2]." (Italics added.)

14. As will appear from the above, the statement in question was not made by the Prime Minister "in commenting upon objections voiced by a member of the opposition", as alleged by Applicants [3].

And, it also appears that, in posing the question whether the measure dealt with was—

"... a step to incorporate South West *further* in the Union and no longer to keep the South West Administration, its legislation and its publications separate [4]" (italics added),

Senator Conradie was dealing only with closer administrative integration, and not with incorporation in the sense of annexation of the Territory.

It will also be noted that the Prime Minister stated that the relevant measure had nothing to do with incorporation (i.e., in the sense of annexation of the Territory).

He pointed out that although, in Respondent's view, the Mandate no longer existed, the power to be exercised was one which fell within the powers provided for in the Mandate, viz., the right to govern the Territory as an integral part of South Africa.

F. Conclusion

15. In the premises aforestated, it is submitted that the statements referred to by Applicants in no way justify the inferences contended for

[1] *U. of S.A., Parl. Deb., Senate*, Vol. IV (1957), Cols. 5533-5534.
[2] *Ibid.*, Col. 5535.
[3] I, p. 189.
[4] *U. of S.A., Parl. Deb., Senate*, Vol. IV (1957), Col. 5534.

by them. On the contrary, upon a proper analysis of such statements in their context and against the background of Respondent's consistent attitude and declared intentions, both prior to and after such statements, it is clear that:

(a) It is *not* Respondent's intent or purpose to incorporate the Territory;

(b) Respondent has consistently stated and given the assurance that it would continue to administer the Territory in the spirit of the Mandate—i.e., as if all the obligations relating to the sacred trust were still in existence;

(c) and Respondent has repeatedly indicated that its actions in regard to the Territory would have been permissible under the Mandate if it had still been in force, and that such actions did not constitute, and were not intended as, acts of incorporation.

CHAPTER IV

CONFERMENT OF SOUTH AFRICAN CITIZENSHIP UPON THE INHABITANTS OF SOUTH WEST AFRICA

A. Introductory

1. The first of Respondent's acts alleged by Applicants to be "inconsistent with the international status of the Territory" is what Applicants term the "General conferral of Union citizenship upon the inhabitants of the Territory" [1].

At I, page 190 Applicants cite a resolution of the Council of the League of Nations of 23 April 1923 concerning the national status of Native inhabitants of mandated territories. Applicants then refer to certain legislative measures of Respondent relative to South African nationality and citizenship, which measures are said to be in conflict with the Council's resolution, on the ground, as Applicants allege, that Respondent has by such measures "identified the status of inhabitants of the Territory with that of Nationals of the Union" through processes having "general application" [1]. And thus, say Applicants, Respondent has "violated its obligations as stated in Article 22 of the Covenant and Article 2 of the Mandate" [2].

Before dealing with the specific legislative enactments referred to by Applicants, it is necessary to give attention to the history and import of the Council's resolution, which forms the basis of the charge made by Applicants—a matter to which the next succeeding paragraphs are devoted.

B. The Resolution of the Council of the League of Nations of 23 April 1923

2. In the report of the First Session of the Permanent Mandates Commission, which was submitted to the Council of the League of Nations on 10 October 1921, the Chairman of the Commission, the Marquis Theodoli, said that:

> ". . . the question of the national status of the inhabitants of the mandated territories, which was brought to the notice of the Commission when it examined the report on South-West Africa . . . deserves a very detailed examination and . . . calls for the speediest possible solution [3]".

And the Commission raised the following questions in its report:

> "Is it desirable that the population placed under the administration of the Mandatory Powers, acting on behalf of the League of Nations, should be granted the nationality of the Mandatory Powers, owing to the fact that the system laid down in the Covenant has

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[1] I, p. 190.
[2] *Ibid.*, p. 192.
[3] *L. of N., O.J.*, 1921 (Nos. 10-12), p. 1126.

come into operation? Should they keep their former nationality, or should some other system be adopted? [1]"

The Council considered these questions and resolved to request the Chairman of the Permanent Mandates Commission and two of his colleagues to form a sub-committee for the purpose of seeking further information on the question of the nationality of the inhabitants of B and C Mandated areas [2].

3. In response to the said request the Commission submitted to the Council proposals to the effect that in general the Native inhabitants should be granted a national status distinct from that of the nationals of the Mandatory Power, preferably by legislative act of the Mandatory Power. Included in the Commission's proposals was the following:

"III. It is open to mandatory Powers to which B and C mandated territories have been entrusted to make arrangements, in conformity with their own laws, for the individual and purely voluntary acquisition of their nationality by inhabitants of these territories [3]."

The following reasons were adduced by the Commission in support of the said proposal:

"III. In justification of the third proposal, the Commission wishes to submit to the Council the following consideration.

It seems contrary to the spirit of the Covenant and to the essence of the institution of mandates to permit the compulsory naturalisation, by a single act, of all the inhabitants of territories under B and C Mandates. The legal relations which exist between a mandatory Power and the territory which it administers on behalf of the League of Nations do not appear to permit of a measure which a State annexing a territory cannot apply with regard to the inhabitants annexed except by virtue of provisions expressly inserted in the Treaty of Cession. The Treaty of Versailles, by the terms of which the former German Colonies were handed over to the Principal Allied and Associated Powers, to be administered on behalf of the League of Nations by Powers called mandatory, contains no clause imposing the nationality of the mandatory Power on the inhabitants of those colonies [4]."

4. After consideration of the said proposals the League Council on 23 April 1923 passed the resolution cited at I, page 190. For convenience the resolution is repeated here:

"In accordance with the principles laid down in Article 22 of the Covenant; [the Council] Resolves as follows:

(1) The status of the native inhabitants of a mandated territory is distinct from that of the nationals of the mandatory Power and cannot be identified therewith by any process having general application.

(2) The native inhabitants of a mandated territory are not invested with the nationality of the Mandatory Power by reason of the protection extended to them.

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[1] *L. of N., O.J.*, 1921 (Nos. 10-12), p. 1126.
[2] *Ibid.*, p. 1133.
[3] *P.M.C., Min.*, II, p. 68.
[4] *Ibid.*, XV, p. 276 (*Annex 14*).

(3) It is not inconsistent with (1) and (2) above that individual inhabitants of the mandated territory should voluntarily obtain naturalisation from the Mandatory Power in accordance with arrangements which it is open to such Power to make with this object under its own law.

(4) It is desirable that native inhabitants who receive the protection of the Mandatory Power should in each case be designated by some form of descriptive title which will specify their status under the mandate [1]."

5. It is observed from the proposals of the Commission that it was not averse to the nationality of a Mandatory power being extended to the inhabitants of the mandated territory—its objection was to a particular manner of conferment of such nationality, namely by "compulsory naturalization by a single act, of all the inhabitants". And the Council's resolution gave effect to what the Commission had proposed in this regard.

C. Extension of South African Citizenship to British Subjects in South West Africa Prior to 1949

6. During 1928 questions arose in the Permanent Mandates Commission and in the League Council regarding the nationality of the inhabitants of South West Africa.

The relevant laws governing the position at the time were the following:

(a) Act No. 40 of 1927, The Union Nationality and Flags Act. This Law conferred Union Nationality on—

"a person born in any part of South Africa included in the Union who is not an alien or a prohibited immigrant under any law relating to immigration; [2]".

Section 9 of the Act defined an "alien" as "a person who is not a British subject". "British subject" had, according to section 9, the meaning assigned to it in Act No. 18 of 1926. Section 9 of the Act also defined "Union" as including "the mandated territory of South West Africa".

(b) Act No. 18 of 1926, The British Nationality in the Union and Naturalization and Status of Aliens Act. The provisions of this law specified the persons who were deemed to be British subjects. Section 1 of the Act contained a definition of the expression "Natural-born British subjects", and provided, *inter alia*:

"I. (1) The following persons shall in the Union be deemed to be natural-born British subjects, namely:

(a) Any person born within His Majesty's dominions and allegiance;".

"British subject" was defined in section 30 (1) of the Act as—

". . . a person who is a natural-born British subject, or a person who is the holder of a certificate of naturalisation or a person who has become a subject of His Majesty by reason of any annexation of

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[1] *L. of N., O.J.*, 1923 (No. 6), p. 604.

[2] Act No. 40 of 1927, sec. 1 *(a)*, in *Statutes of the Union of South Africa, 1927-1928*, Vol. II, p. 2.

territory, or otherwise has under this Act become a British subject;". It was further provided in section 30 (1) of the Act that: ". . . 'the Union' includes also, in addition to the limits of the Union of South Africa, the Mandated Territory of South-West Africa."

7. With regard to the Native inhabitants of South West Africa the legal position was explained as follows in a memorandum dated 19 December 1928 submitted by Respondent at the request of the Council of the League:

"B. *Native Inhabitants*

No legislative measure conferring automatic naturalisation upon the native inhabitants, nor giving them some form of descriptive title, has been passed. They are regarded as stateless subjects under the protection of the mandatory Power, and in a passport such a person would be described as a native inhabitant of South-West Africa under the protection of the Union of South Africa in its capacity as mandatory of South-West Africa. There is, however, nothing to prevent the native inhabitants from applying for naturalisation under Act 18 of 1926, and in this respect they stand in precisely the same position as Europeans who are aliens [1]."

8. In response to questions by the Permanent Mandates Commission the position was once more explained in a memorandum by Respondent dated 19 June 1929, as follows:

"Section 1 of Act 18 of 1926 provides that 'any person born within His Majesty's Dominions and allegiance' shall be deemed to be a British subject. As the mandated territory is not part of His Majesty's Dominions, it follows that a person is not deemed to be a natural-born British subject merely by reason of his birth in that territory [2]."

And,

"As persons born in South West Africa of alien or rather non-British parents do not become British subjects *jure soli* persons born in that territory are Union nationals only if born of British parents, natural born or naturalised, and are such nationals only if they themselves are still domiciled there and have not become aliens [3]."

9. During the Fourteenth Session of the Permanent Mandates Commission in 1928, Respondent's representative explained that Act No. 40 of 1927 did not affect the status of Native inhabitants of South West Africa. He is reported to have said that:

"The whole basis of the law was that, before a person could become a Union national, he must be a British subject. Once that point was realised, the Act became perfectly plain. A native of South-West Africa was not a British subject, and, that being so, he could not become a Union national [4]."

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[1] *L. of N., O.J.*, 1929 (No. 5), p. 827.

[2] *Ibid.* (No. 8), p. 1287.

[3] *Ibid.*, p. 1288. As regards the proposition that the mandated territory was not part of "His Majesty's Dominions", see further *Ffrost* v. *Stevenson*, 1937, 58 C.L.R. 528, at pp. 550, 552-553, 581-582, quoted by Judge McNair in *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, pp. 151-153.

[4] *P.M.C., Min.*, XIV, p. 80.

In this regard M. van Rees, a Member of the Commission, is reported to have said:

> "He inferred from the accredited representative's reply that the natives of the mandated territory had not automatically become either nationals of the Union or British subjects in consequence of the application of the Act [1]."

It would appear that the South African Government's explanation regarding the status of the Territory's Native inhabitants was accepted by the Permanent Mandates Commission and the League Council.

10. Applicants, however, in charging that—

> ". . . the Union has by processes of general 'application' identified the status of inhabitants of the Territory with that of Nationals of the Union [2]".

also cite from the aforementioned Acts, and appear to question Respondent's explanation to the Permanent Mandates Commission, referring to it as something which Respondent could "plausibly contend" [3].

Applicants' attitude in this regard presumably rests on the wording of section 30 (1) of Act No. 18 of 1926, which provided ". . . 'the Union' includes also, in addition to the limits of the Union of South Africa, the Mandated Territory of South-West Africa", and which is italicized by Applicants at **I**, page 190.

Applicants might intend to suggest that this definition of "the Union" rendered South West Africa a part of the Union and therefore also a part of "His Majesty's Dominions" for the purposes of section 1 (1) *(a)* of Act No. 18 of 1926, which would have meant that all persons born in South West Africa would in terms of the said Act have been regarded as "Natural-born British subjects".

If this is indeed what Applicants have in mind, the suggestion would be unfounded. Section 30 (1) was merely a definition section, ascribing a meaning to the expression "the Union" where it occurred in the Act. In section 1 (1) (in so far as relevant) that expression occurred only in the context that certain persons, as described in paragraphs *(a)*, *(b)* and *(c)*, would "in the Union be deemed to be natural-born British subjects"[4].

Thus the following summary of the position by M. van Rees, in a memorandum submitted to the Permanent Mandates Commission at its Sixteenth Session [5], was perfectly correct:

> "Article 30 lays down that 'the Union includes also, in addition to the limits of the Union of South Africa, the mandated territory of South West Africa'.
>
> It follows that the persons contemplated in paragraphs *(a)*, *(b)* and *(c)* of Article 1 are deemed to be natural-born British subjects *within the limits of the Union and South West Africa*. It does *not* follow that any person born or domiciled in the latter territory is deemed to be a natural-born British subject.
>
> This interpretation is confirmed by the South-African Government's memorandum of June 19th, 1929 (document C.P.M. 898), in

[1] *P.M.C., Min.*, XIV, p. 80.
[2] **I**, p. 190.
[3] *Ibid.*, p. 192.
[4] *Vide* para. 6 *(b)*, *supra*.
[5] 6 to 26 Nov. 1929.

which it is stated that 'as the mandated territory is not part of His Majesty's Dominions it follows that a person is not deemed to be a natural-born British subject merely by reason of his birth in that territory'.

I may say, in short, that, from the point of view of the mandate, the Act of 1926 does not seem to call for any criticism [1]."

11. In the premises Respondent submits that the allegations of Applicants relative to the aforementioned two Acts, and their criticism of Respondent's explanation regarding the effect thereof, are without foundation.

D. The Position under the South African Citizenship Act, 1949 (Act No. 44 of 1949)

12. Applicants refer to Act No. 44 of 1949 and cite the provisions of sections 2 (2), 5 (1) *(e)* and 38 thereof [2].

(a) Section 38 of the Act, it is submitted, has no bearing on the grant of South African citizenship. As is apparent from the text of the section, it merely equates certain terms used in prior legislation with the terminology introduced by Act No. 44 of 1949.

(b) Under section 5 (1) *(e)*, South African citizenship by descent is conferred on a child (born before 2 September 1949) of a father who was, at the time of such child's birth, a British subject under the laws then in force in the Union, and domiciled in the Union or South West Africa. The section clearly refers only to the children of a particular class of persons, viz., British subjects, who had obtained such status legitimately under laws previously in force. This is further emphasized by section 5 (4) of the Act, which reads as follows:

"No person who, immediately prior to the date of commencement of this Act, was neither a Union national nor a British subject under the law then in force in the Union, shall be a South African citizen by virtue of the provisions of this section."

Section 5 (1) *(e)*, therefore, also has no bearing upon Applicants' thesis.

(c) Section 2 (2) of the Act, however, granted South African citizenship by birth to all persons born in South West Africa after 1 July 1926, and before 2 September 1949, and who complied with the conditions referred to in the sub-section.

In terms of section 16 (3) of the Act, such persons were given the right to renounce their South African citizenship within 12 months after the date of commencement of the Act.

It is conceded that section 2 (2) extended South African citizenship to persons born in South West Africa during the period stated, including the Natives, without their having been British subjects.

13. Respondent, however, denies that the provisions of the said Act are inconsistent with the international status of the Territory, and denies that in passing the Act it has "violated its obligations as stated in Article 22 of the Covenant and Article 2 of the Mandate" [3].

[1] *P.M.C., Min.*, XVI, p. 188 (Annex 8 *(a)*).
[2] I, p. 191.
[3] *Ibid.*, p. 192.

Full powers of legislation were granted to Respondent under the Mandate. Such powers included the power to apply Respondent's laws to the Territory. There is nothing in the Covenant or in the mandate instrument which expressly or by implication prohibited Respondent from conferring South African nationality upon the inhabitants of the mandated territory.

The Council of the League, in its resolution of 23 April 1923, recognized that individual inhabitants of a mandated territory could voluntarily obtain the nationality of the Mandatory Power [1]. It is implicit in this ruling that if individual inhabitants could legitimately acquire the nationality of a Mandatory, a *de facto* position could arise where a large number of, or even all, the inhabitants could be endowed with such nationality. It is clear that the fact of there being a common nationality, shared by the inhabitants of the Mandatory State and those of the mandated territory, could in terms of the resolution not by itself affect the international status of the mandated territory. What the Council objected to was a particular manner of conferment of nationality, and not the fact of conferment of nationality by itself [2].

14. It is submitted, furthermore, that the conferment of South African citizenship by Act No. 44 of 1949 on certain inhabitants of the Territory did not bring about a diminution of the existing rights of such inhabitants. In this regard the position is analogous to that which obtained under Act No. 40 of 1927 [3], whereby a second nationality was conferred upon certain persons in the Territory. The South African nationality conferred under the said Act did not, to quote M. van Rees,

> "... absorb the nationality of so-called British subjects in the nationality of the Union. It deprived them of nothing, but granted them, on the contrary, the advantage of being able to take part in the public life of the territory. These persons, therefore, had not lost their status as British subjects [4]."

15. Respondent denies the Applicants' allegation that the provisions complained of were enacted in furtherance of a plan or purpose to incorporate the Territory [5].

As already indicated [6], Respondent consistently declared, both before and after the adoption of this Act, that is was not proceeding to incorporate the Territory, and that it had the firm intention of administering the Territory "in the spirit of the Mandate".

It must be pointed out, furthermore, that as far as Respondent is aware, it was at no stage prior to the commencement of these proceedings suggested by anyone that the adoption of Act No. 44 of 1949 was inconsistent with the international status of the Territory.

Respondent repeats that it at no stage regarded the provisions of this Act as being in conflict with the international status of the Territory.

16. Respondent further denies the allegation that the provisions of

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[1] *Vide* para. 4, *supra*.
[2] *Ibid.*, para. 5.
[3] Certain provisions of which are cited in para. 6, *supra*.
[4] *P.M.C., Min.*, XVI, p. 129.
[5] I, p. 189.
[6] *Vide* Chap. II, *supra*.

the Act in question were intended to, or do in fact, frustrate the objective of promoting "conditions under which the Territory's inhabitants may progress toward self-determination" [1].

The conferment of nationality by the provisions of the Act cannot of itself amount to, or be regarded as, an impediment to progress towards possible self-determination. Applicants have in no way spelled out their allegations in support of their complaint in this regard. Progress to maturity is in no way affected by nationality, unless nationality legally imposes limits on opportunities for progress, which it does not do. The neutral character of these provisions can perhaps be demonstrated in the following way: if Act No. 44 of 1949 were to be amended to conform to the position prior to 1949 as far as South West Africa is concerned, it would not in any way open new avenues for progress towards political maturity.

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[1] I, p. 195.

CHAPTER V

INCLUSION OF REPRESENTATIVES FROM SOUTH WEST AFRICA IN THE SOUTH AFRICAN PARLIAMENT

A. Introductory

1. The South West Africa Affairs Amendment Act, 1949 (Act No. 23 of 1949), provides in the following terms for representation of the Territory in the South African Parliament:

(a) "The territory shall be represented in the House of Assembly by six members to be elected in accordance with the provisions of this Act [1]."

(b) "The territory shall be represented in the Senate by four senators, two of whom shall be nominated by the Governor-General, and the other two elected as hereinafter provided [2]."

2. Applicants contend that the Act gives effect to a "policy of 'political integration'" and violates Respondent's obligations in the following respects, namely:

(a) the Act is inconsistent with the international status of the Territory because it is "part of a plan to incorporate the Territory politically", and "erodes the international status of the Territory;" [3] and

(b) the Act "impedes opportunity for self-determination by the inhabitants", and it "excludes 'natives' from the processes of self-government" [3]. Respondent will deal with these charges separately.

B. The Allegation that the Act Is "Inconsistent with the International Status of the Territory" [4]

3. Respondent submits that the fact that there is representation of South West Africa in the South African Parliament cannot and does not affect the international status of the Territory. Respondent has the duty of administering the Territory, and such representation has the obvious advantage that representatives of the Territory are enabled directly to inform Respondent's Parliament as to the needs of the Territory and to influence its decisions in regard thereto. As Respondent's Parliament is the ultimate authority in South West African affairs, this right of representation can only be to the benefit of the Territory.

As stated in Chapter II above, the granting of such representation was already foreseen in 1920 by General Smuts [5] and the Commission of Enquiry as to the future Constitution of the Territory in 1921 likewise recommended a form of government giving the population of South

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[1] Sec. 27 (1), in *The Laws of South West Africa 1949*, Vol. XXVIII, p. 182.
[2] Sec. 30 (1), in *The Laws of South West Africa 1949*, Vol. XXVIII, p. 182.
[3] I, p. 193.
[4] *Ibid.*, p. 189.
[5] *Vide* Chap. II, para. 4, *supra*.

West Africa "full representation in a Provincial Council and in the Union Parliament" [1].

4. Respondent submits that the fact that the South West African representatives participate in deliberations relating to the Territory, is in no way inconsistent with the international status of the Territory. And the fact that such representatives can also speak and vote on matters regarding Respondent's domestic affairs, can also not affect the international status of the Territory. Respondent, as a sovereign State, has full authority to allow anyone it wishes to participate in its government.

5. The Committee on South West Africa, whose report for the year 1956 is cited by the Applicants [2], could not suggest that, seen objectively, representation of a mandated territory in the legislative institutions of the Mandatory Power would be inconsistent with the international status of such Territory. In the very report cited by Applicants the Committee stated, *inter alia*, that it could—

> ". . . conceive of circumstances in which representation of a Mandated Territory in the legislative institutions of the Mandatory Power might be of certain advantage to the inhabitants, after due consultation with them and with proper safeguards for their special status, as a means of extending to them political and parliamentary experience and an opportunity to take part in making the laws under which they live, especially if it were not feasible for the Territory to have a legislative organ of its own [3]".

6. In this regard it is significant that in the case of certain trust territories, formerly under mandate, provision was made for their representation in legislatures external to such territories. Thus under the Nigerian Constitution of 1951, the British Cameroons, a territory under trusteeship, had representation in the Nigerian House of Representatives, and also in the regional legislative organs [4]. And the Trust Territory of the Cameroons under French Administration was, as an "Associated Territory" of the French Union, given representation in the organs of the French Parliament [5].

So also, under the Gold Coast constitutional reform of 1953, the Trust Territory of British Togoland was allotted 14 seats out of a total of 104 seats in the Gold Coast Legislative Assembly. While the northern sector of the Territory was thus treated as an integral part of the Gold Coast, the south again was represented by 21 members out of 39 on the regional body of the Trans-Volta/Togoland Council. The French Sector of Togoland also formed part of the French Union as an "Associated Territory" [6].

Although the idea of having these so-called "administrative unions" was at various times questioned by certain States in the United Nations, the Trusteeship Council, which at the request of the General Assembly [7]

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[1] *U.G.* 24—1921, para. 7, p. 4. *Vide* Chap. II, para. 4, *supra.*

[2] I, pp. 192-193.

[3] *G.A., O.R.*, Eleventh Sess., *Sup.* No. 12 (A/3151), p. 8.

[4] Chowdhuri, R. N., *International Mandates and Trusteeship Systems* (1955), p. 270.

[5] *Ibid.*, pp. 270-271.

[6] *Ibid.*, p. 271.

[7] *Vide G.A. Resolution* 224 (III), 18 Nov. 1948, in *U.N. Doc.* A/810, pp. 86-87.

gave special consideration to the aforementioned constitutional arrangements, while suggesting certain safeguards intended for the preservation of the separate status and identity of the trust territories participating in such unions [1], did *not* find that the mere representation of a trust territory in an external legislative body was inconsistent with the separate international status of such territory [2]. Consequently the General Assembly permitted continuation of the arrangements concerned.

7. Respondent also denies the allegation that the Act is "part of a plan to incorporate the Territory". Representation of the Territory in the South African Parliament, such as provided for in the Act, had been requested of Respondent in a resolution of the House of Assembly of the Union Parliament in 1947, which was brought to the notice of the United Nations [3]. In that and the following years Respondent repeatedly explained that such representation was proposed for the benefit of the Territory, and gave the assurance that it "did not mean that Territory's incorporation or absorption in the Union of South Africa" [4], an assurance which was formally noted by the General Assembly of the United Nations [5]. Although resolutions were proposed in organs of the United Nations during the years 1949 and 1950 to the effect that the Act constituted "a violation of the Charter", such proposed resolutions were repeatedly rejected [6].

The frank and open manner in which Respondent dealt with this matter—particularly by advising the United Nations Organization of its intentions and proposed actions—belies, it is submitted, any suggestion that the Act in question was passed for the purpose of furthering an "insidious and elusive" process of "piece-meal incorporation" of the Territory [7].

C. The Allegations that the Act "Impedes Opportunity for Self-Determination" and "Excludes 'Natives' from the Processes of Self-Government" [8]

8. To substantiate this charge, Applicants rely in the first place on their preceding contention that representation of the Territory in Respondent's Parliament is inconsistent with the international status of the Territory. The alleged "erosion" of the international status of the Territory is stated to impede opportunities for self-determination by the inhabitants of the Territory [8]. Applicants do not state in which manner opportunities for self-determination are in fact impeded.

Secondly, they aver that representation of the European inhabitants of the Territory in the South African Parliament "excludes 'natives'

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and *G.A. Resolution* 563 (VI), 18 Jan. 1952, in *G.A., O.R., Sixth Sess., Sup.* No. 20 (A/2119), p. 59.

[1] *T.C. Resolution* 293 (VII), 17 July 1950, in *T.C., O.R., Seventh Sess., Resolutions, Sup.* No. 1 (T/794), pp. 49-55.

[2] *Vide G.A., O.R., Seventh Sess., Sup.* No. 12 (A/2151), pp. 28, 36, 56.

[3] *Vide* Chap. II, para. 15, *supra.*

[4] *G.A., O.R., Third Sess., Part I,* 164th Plenary Meeting, 26 Nov. 1948, p. 588. *Vide* also Chap. II, paras. 15-18, *supra.*

[5] *Vide* Chap. II, para. 18, *supra.*

[6] *Ibid.*, para. 20.

[7] I, p. 186.

[8] *Ibid.*, p. 193.

from the processes of self-government", but the only process of self-government here in issue is representation in Respondent's Parliament —the very act of which Applicants make complaint.

Respondent denies, in any event, that the exclusion of the Native inhabitants of the Territory from participating in elections for representatives in the South African Parliament in any way impedes their opportunities for progress towards possible self-determination. In Respondent's view, such representation as here in issue would not, having regard to their present stage of development, needs, traditions, culture and attendant circumstances, serve the best interests of the Native inhabitants. Accordingly, as has been indicated elsewhere in this Counter-Memorial [1], alternative opportunities for development in the processes of self-government and for progress towards possible self-determination, more suited to their needs and circumstances, are provided for the various Native groups of the Territory. The representation of the European inhabitants in Respondent's Parliament cannot and will not in any way retard the political advancement of the Native inhabitants of the Territory.

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[1] *Vide* Respondent's reply to the charges made by Applicants in Chapter V of the Memorials.

CHAPTER VI

ADMINISTRATIVE SEPARATION OF THE EASTERN CAPRIVI ZIPFEL

A. Introductory

1. Applicants contend that *"Administrative Separation of the Eastern Caprivi Zipfel"* is inconsistent with the international status of South West Africa, and state that the Committee on South West Africa, in its report for the year 1955, "condemned" the separate administration of the said area "as a violation of the Mandate and rejected the avowed purpose of the action, for reasons which the Applicant[s] fully endorse" [1].

In support of this allegation, Applicants cite an extract from the said report in which the Committee expressed the view that the "administrative separation of any portion of the mandated territory would place obstacles in the way of the fulfillment of" one of the conditions laid down by the League of Nations for the termination of the mandates regime in respect of any mandated territory, namely that "it [the Territory] must be capable of maintaining its territorial integrity and political independence" [2].

In the extract cited by Applicants the Committee also questioned the reasons advanced by Respondent for the separate administration of the area [2].

2. Before dealing with Applicants' allegations, it is considered advisable to refer again, briefly, to Respondent's general policy regarding the control and administration of Native Affairs in South West Africa, and then to deal in chronological order with the following three distinct phases in the administration of the Eastern Caprivi Zipfel, namely:

(a) the period 1921 to 1929, when the area was administered by the High Commissioner of South Africa as if it were a portion of the Bechuanaland Protectorate;

(b) the period 1929 to 1939, when the area was administered by the Administrator of South West Africa as representative of the South African Government; and

(c) the period 1939 to the present, during which the area has been administered by the South African Minister of Native Affairs (now designated the Minister of Bantu Administration and Development).

B. The Control and Administration of Native Affairs Generally

3. From the inception of the Mandate the South African Government assumed direct control of Native Affairs in South West Africa. Certain legislative and administrative powers in regard to Native Affairs were given to the Administrator of the Territory, but such powers were exercised under the direction and control of the Governor-General, i.e., the Union Government. When the South West Africa Constitution Act, No.

[1] I, p. 193.
[2] *Ibid.*, pp. 193-194.

42 of 1925, was passed, Native Affairs was one of the subjects, which was expressly excluded from the competence of the Legislative Assembly of South West Africa, and the Administrator continued to act in respect thereof as before, i.e., under the direction and control of the Governor-General-in-Council. The South West Africa Native Affairs Administration Act, 1954 (Act No. 56 of 1954), which came into operation on 1 April 1955, transferred the powers previously held by the Administrator in regard to Native Affairs to the South African Government's Minister of Native Affairs, who functions under the direction and control of the Governor-General-in-Council. The effect of the said Act was, therefore, to transfer the administration of Native Affairs in the Territory from one organ of the South African Government (the Administrator) to another (the Minister of Native Affairs) [1].

The position as stated in this paragraph did not apply to the Eastern Caprivi, which is dealt with in the next succeeding paragraphs.

C. Administration of the Eastern Caprivi Zipfel, 1921 to 1929

4. The Caprivi Zipfel is a long narrow strip of territory forming the extreme north-eastern part of South West Africa, extending between Angola and Bechuanaland, towards the Rhodesias. As explained elsewhere in this Counter-Memorial [2], it was obtained by the German Government on 1 July 1890 as a zone of free access from her Protectorate to the Zambesi River, and was to be not less than 20 English miles in width at any point.

5. From the very inception of the Mandate, difficulty was experienced in effectively controlling that portion of the territory east of a line between 23° and 24° longitude, known as the Eastern Caprivi Zipfel (but often referred to as the Caprivi Zipfel, or simply as the Caprivi), because of its geographical situation and the lack of communications with the rest of South West Africa. These circumstances gave rise to special provisions for the administration of the area.

According to Proclamation No. 12 of 1922 (S.A.) [3], the Caprivi Zipfel had since the withdrawal of martial law, on 1 January 1921, been administered by the High Commissioner for South Africa, the Governor-General, who as representative of the British Government was then also in charge, *inter alia*, of Bechuanaland. By that Proclamation the High Commissioner was declared to be the Administrator, with legislative powers, of the Caprivi Zipfel as from 1 January 1921. The High Commissioner, by Proclamation No. 23 of 1922 (S.A.), provided for the administration of the Eastern Caprivi Zipfel as if it were a portion of the Bechuanaland Protectorate, and for the laws of the Protectorate to be applied thereto. The Resident Commissioner of the Protectorate was to exercise authority in the area on behalf of the High Commissioner.

The reason for the issue of Proclamation No. 12 of 1922 (S.A.) was stated by the Administrator of South West Africa in the following terms:

"By reason of its geographical situation and lack of communica-

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[1] *Vide* Chapter VII, paras. 2-9, *infra*.

[2] *Vide* the account of the History of South West Africa in Book III of this Counter-Memorial.

[3] Second paragraph of the preamble.

tion the Administration of Caprivi Zipfel by this Administration is impracticable [1]."

6. During the Third Session of the Permanent Mandates Commission, in 1923, Sir Frederick Lugard pointed out that there was a district known as the "Caprivi Zipfel area" which had been detached from the administration of the Territory, and in respect of which no report had been submitted to the Commission. Major Herbst, the South African representative, "explained that the area in question consisted in the rainy season of a huge swamp, which could not be approached from the side of the mandated territory. The High Commissioner had, therefore, been asked to take up its administration [2]."

And the Commission, in its special observations regarding administrative organization in South West Africa—

> ". . . took cognisance of the fact that that part of the mandated territory which was known as Caprivi Zipfel had, for geographical reasons, been detached from the general administration of the territory and was administered under the direct control of the Governor-General for South Africa [3]".

7. In 1924, during the Fourth Session of the Permanent Mandates Commission, Sir Frederick Lugard again asked if the Administration of South West Africa administered the Caprivi Zipfel area. Mr. Hofmeyr, who then represented Respondent, answered that the area was administered by the High Commissioner for South Africa, and that it had very little intercourse with the rest of the territory under mandate [4].

8. During the Sixth Session of the Permanent Mandates Commission in 1925, the matter of the administration of the Eastern Caprivi Zipfel was again brought up. From the questions put to the South African representative, Mr. Smit, it seems that at least certain members of the Commission doubted the propriety in law of the administration of the area through the High Commissioner for South Africa.

Thus M. van Rees wished to know whether the area was ". . . still regarded as part of the mandated territory in spite of its incorporation, for administrative purposes, in Bechuanaland?" [5]. And M. Freire d'Andrade emphasized that—

> ". . . the arrangement whereby the Caprivi zone was being administered as part of Bechuanaland was directly contrary to the mandate, and it was the duty of the Commission to obtain complete information in regard to the laws and administration of Bechuanaland [6]".

In the result the Commission requested a special report regarding the position of the Caprivi, and the South African representative promised that a memorandum would be submitted.

9. In compliance with the Commission's request a memorandum dated 20 November 1925 was submitted to it [7]. In the memorandum it was explained that in effect there were two administrators for South

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[1] *U.G.* 21—1923, p. 2.
[2] *P.M.C., Min.*, III, p. 102.
[3] *Ibid.*, p. 325 (Annex 13).
[4] *Ibid.*, IV, p. 57.
[5] *Ibid.*, VI, p. 58.
[6] *Ibid.*, p. 61.
[7] *L. of N. Doc.* C. 717, 1925, VI.

West Africa, each exercising the authority delegated to him by the Mandatory: firstly the Administrator of the Territory with the exclusion of the Caprivi Zipfel, and secondly, the Administrator of the Caprivi Zipfel. In both cases the supreme authority was in the hands of the Mandatory, on whose instructions the two Administrators acted.

10. In 1925, during the Seventh Session of the Permanent Mandates Commission, the administration of the Caprivi Zipfel was again discussed. According to the minutes, M. Freire d'Andrade—

> "... reminded the Commission that he had observed last year that this territory was under the administration of the High Commissioner for South Africa. He did not clearly understand what was the present position [1]."

In reply Sir Frederick Lugard said, *inter alia*, that:

> "... neither the High Commissioner for South Africa nor the Resident Administrator of Bechuanaland were under the authority of the Union Government, and that the Union Government could not therefore issue instructions to them.
>
> The principle at issue was whether the mandatory Power had authority to delegate the government of a portion (large or small) of a mandated territory *to another authority* without the permission of the Council of the League. This was clearly an important principle.
>
> He thought it was important to note that the Governor-General administered the Caprivi zone as a delegate of the mandatory Power and not as High Commissioner for Bechuanaland [2]." (Italics added.)

And M. Rappard is reported as having said that—

> "... the mandatory Power was in this case the Union of South Africa, which must clearly assume full responsibility. The Commission had reason to doubt whether the Administrator of Caprivi Zipfel was in fact responsible to the mandatory Power. The Commission must, however, presume that the administrative authority in Caprivi Zipfel was acting, so far as this territory was concerned, on behalf of the mandatory Power, and that the mandatory Power was ultimately responsible. It must, in fact, be assumed that the mandatory Power had not delegated its responsibility and that its choice of the High Commissioner or of the Resident of Bechuanaland to administer this territory had been made on the same footing, so far as the Commission was concerned, as its choice of Mr. Hofmeyr to administer the territory of South-West Africa. The Union Government retained the mandate and had chosen a certain person to administer the territory [3]."

11. The Commission again discussed the matter at the Eighteenth Meeting of its Seventh Session in 1925. Sir Frederick Lugard then said that—

> "... the essential question for the Commission to ascertain was whether the Administrator of Caprivi Zipfel received his instructions from the Government of South Africa direct or from the Adminis-

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[1] *P.M.C., Min.*, VII, p. 16.
[2] *Ibid.*, pp. 16-17.
[3] *Ibid.*, p. 17.

tration of the mandated territory. In the former case, the mandate would be divided into two parts; in the latter, it would be merely a delegation by the Administrator[1]."

And the Commission, in its observations to the League Council, noted that it—

"... would appreciate a clear and concise statement from the mandatory Power explaining, from the legal standpoint, the administrative relations between Caprivi-Zipfel and the mandatory Power. It is particularly anxious to know whether the Administration takes its instructions from the Administrator for South-West Africa or whether it is directly under the control of the Government of the Union of South Africa[2]."

12. Although no further action was taken by the Permanent Mandates Commission in regard to the matter, it is apparent from the aforegoing that misgivings were expressed as to the propriety of administering the Eastern Caprivi Zipfel through the Bechuanaland Authorities and subject to the laws applicable in the Bechuanaland Protectorate. These misgivings influenced Respondent to bring about a change in the administration of the area, as will be dealt with in the next succeeding paragraphs.

D. The Period 1929 to 1939

13. By Proclamation No. 196 of 1929 (S.A.), the administration of the Eastern Caprivi Zipfel was transferred from the Bechuanaland Authorities to the South West Africa Administration. The Administrator of South West Africa was appointed as Administrator of the Caprivi Zipfel, and the Governor-General's legislative powers were delegated to the Administrator. And by Proclamation No. 26 of 1929 (S.W.A.), the Administrator applied the laws of South West Africa to the Caprivi Zipfel.

14. During the Eighteenth Session of the Permanent Mandates Commission in 1930, Lord Lugard enquired as to—

"... the reasons for which the Caprivi Zipfel which properly belonged to the mandated territory and had hitherto been administered under the Bechuanaland territory, had now been retransferred to the administration of the mandated territory[3]".

In reply the South African representative, Mr. Courtney Clarke, said that—

"... so far as he was aware, this was a question that had been raised by the Mandates Commission, and that the transfer had been carried out in deference to the Commission's wishes. He hoped that, should difficulties arise in the administration of so remote a territory, the members of the Commission would remember that it was they who had suggested the transfer[3]."

According to the record, Lord Lugard explained that—

"... the Mandates Commission had asked why a part of the

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[1] *P.M.C.*, Min., VII, p. 135.
[2] *Ibid.*, p. 217 (Annex 14).
[3] *Ibid.*, XVIII, p. 132.

mandated territory was being administered separately, *but had never insisted on its retransfer* [1]". (Italics added.)

15. The administration of the Caprivi Zipfel by Respondent through the agency of the Administrator of South West Africa continued from 1929 to 1939. During that period, constant difficulties were experienced in the administration of the area by reason of its geographical inaccessibility from the rest of South West Africa. In fact these difficulties, which are dealt with more fully hereinafter [2], had, according to an official report, resulted in "a period of almost complete stagnation" [3].

The South West Africa Administration accordingly requested Respondent to be relieved of the administration of the area [4].

E. The Period 1939 to Date

16. By Proclamation No. 147 of 1939 (S.A.), it was provided that the Eastern Caprivi Zipfel would in future be administered by Respondent's Minister of Native Affairs. The second paragraph of the preamble to the Proclamation read as follows:

> ". . . experience has shown that the geographical position of that portion of the Caprivi Zipfel . . . referred to as the Eastern Caprivi Zipfel, makes it expedient that it should be administered by the Minister of Native Affairs of the Union or by another Minister of State of the Union acting on his behalf; . . .[5]"

17. In the Annual Report to the League of Nations in 1939, the reasons for the transfer of the administration of the area to the Minister of Native Affairs were explained as follows:

> "*Transfer of Administrative Control of the Eastern Caprivi Zipfel to the Union Native Affairs Department.*—Ever since it was decreed by Union Proclamation No. 196 of 1929 that the Caprivi Zipfel . . . should be administered as part of the said Territory, difficulty has been experienced in controlling the Eastern portion (the portion to the East of the Kwando River) owing to its geographical position. The only way of reaching it from Windhoek is either through Bechuanaland or by rail through the Union and the two Rhodesias via Livingstone. The latter route was the one usually taken. A direct way via Grootfontein is impossible, there being two large rivers (the Okavango and the Kwando) to be negotiated and a dry, uninhabited, trackless, desertlike stretch to be traversed.
>
> Moreover, more direct control of the area was very necessary if in the interests of the residents and of adjoining territories it was to be kept free from cattle diseases.
>
> It was therefore decided that from a point of convenience control *subject, however, to the terms of the Mandate,* should be vested in the Union Minister of Native Affairs and this was accomplished by the promulgation of the Eastern Caprivi Administration Proclamation, 1939 (Proclamation No. 147 of 1939) [6]." (Italics added.)

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[1] *P.M.C., Min.*, VIII, p. 132.
[2] *Vide* paras. 17 and 29-31, *infra.*
[3] *Report on the Administration of the Eastern Caprivi Zipfel*, 1940, p. 10.
[4] *Ibid.*, p. 11.
[5] *Proc.* No. 147 of 1939 (S.A.), 21 July 1939, in *The Laws of South West Africa, 1939*, Vol. XVIII, p. 28.
[6] *U.G.* 30—1940, pp. 134-135.

And in the report the hope was expressed that by such transfer—

"... the Government will be able to comply more fully with the terms of the Mandate by *devoting more attention to the welfare of the Native population* [1]". (Italics added.)

18. Early in 1939, and before the promulgation of Proclamation No. 147 of 1939 (S.A.), the Permanent Mandates Commission was informed of its proposed terms and effect and of the reasons for bringing about a change in the administration of the area.

After discussion of the matter the following observation was made in the Commission's report to the Council of the League.

"The Commission learned from the annual report that, owing to the difficulty of satisfactorily controlling the eastern part of the Caprivi Zipfel, it is contemplated making over the control of this area to the Union Department of Native Affairs. It noted the statements of the accredited representative to the effect that the officer administering the area in question would work in close co-operation with the mandatory Government which would be acting for the Administration of South West Africa and that information regarding that part of the territory would be included in the annual reports as hitherto.

The Commission holds the view that the administrative arrangement contemplated calls for no observations on its part provided all the provisions of the mandate are properly applied in the eastern portion of the Caprivi Zipfel [2]." (Italics added.)

19. From the aforegoing account of the history of administration of the Eastern Caprivi Zipfel it is clear, in Respondent's submission, that:

(a) ever since the inception of the Mandate, it has been found impracticable to administer the area from South West Africa; in fact the attempt to do so over the years 1929 to 1939 proved a failure;

(b) the Permanent Mandates Commission was satisfied that administration of the area through the Administrator of South West Africa was impracticable;

(c) the separation of the administration of the area from the administration of the rest of the Territory was intended by Respondent to operate for the benefit of the inhabitants of the area;

(d) the separation did not affect the application of the Mandate to the area, and it was never suggested in the organs of the League of Nations that such separation could be regarded as an attempt at annexation or incorporation;

(e) the Permanent Mandates Commission had no objection to the transfer of the administration and control of the area to the Union Department of Native Affairs, provided all the provisions of the Mandate were properly applied in the area.

F. Present Administration of the Eastern Caprivi Zipfel

20. As far as the exercise of legislative functions in respect of the Eastern Caprivi Zipfel is concerned, the position is the same as that which pertains in respect of "native affairs or any matters specially

[1] *U.G.* 30—1940, p. 175.
[2] *P.M.C., Min.*, XXXVI, pp. 280-281 (Annex 14).

affecting natives" [1] in the rest of the Territory. In both cases no Act of the South African Parliament applies unless it is expressly declared to be applicable. In both cases the State President can legislate by proclamation as long as the provisions thereof are not repugnant to, or inconsistent with, an applicable Act of Parliament. In both cases an Ordinance of the Legislative Assembly of South West Africa can apply only when it has received the prior consent of the State President-in-Council. In respect of the Eastern Caprivi Zipfel, an Ordinance would also have to be expressly declared to be applicable, but this additional requirement is merely one of procedure. As the whole of the Eastern Caprivi Zipfel is a Native reserve, and as the population consists almost entirely of Natives, no Ordinances of the Legislative Assembly of South West Africa have in fact been applied to the area. In this regard the practical position in the rest of the Territory is somewhat different inasmuch as Ordinances of the Legislative Assembly in fact regulate certain aspects of Administration such as, for example, education, public health services, etc., which affect all the inhabitants, including the Natives.

21. The Eastern Caprivi is at present administered as a Native Reserve by the same Minister who has, since 1 April 1955, also exercised control, on behalf of the South African Government, of Native Affairs in the rest of South West Africa, i.e., the Minister of Bantu Administration and Development [2]. The only practical difference in the administration of the two areas is that in the Eastern Caprivi all matters of administration are under the control of the said Minister while in the rest of South West Africa, although the said Minister has control of Native Affairs generally, the Administrator controls certain aspects of government such as, for example, education, public health services, etc., which concern all the inhabitants, including the Natives. Save for such limited aspects of government affecting Natives in the rest of South West Africa, which are controlled by the Administrator, there has, as from 1 April 1955, been complete co-ordination between the administration of Native Affairs in the Eastern Caprivi and in the rest of South West Africa.

G. The Allegation that Administrative Separation of the Eastern Caprivi Zipfel Is "Inconsistent with the International Status of the Territory"

22. Applicants allege that the transfer of the administration of the Eastern Caprivi Zipfel from the Administrator of South West Africa to the South African Government by Proclamation No. 147 of 1939 (S.A.) constitutes an act which is "inconsistent with the international status of the Territory". Save for quoting and endorsing certain conclusions of the Committee on South West Africa, which will be dealt with hereinafter, Applicants do not advance any argument in support of their allegation.

Respondent submits that such transfer could not, and did not, in any way, affect the international status of South West Africa. In Respondent's submission it is totally irrelevant, as far as the international status of the Territory is concerned, whether one or another organ or

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[1] *Act* No. 42 of 1925, sec. 26 *(a)*, in *Laws of South West Africa*, Vol. II (1923-1927), p. 16.

[2] *Vide* Chap. VII, paras. 2-9, *infra*.

agency of Respondent is responsible for the administration of the Territory or a portion thereof.

Separate administration by itself, it is submitted, cannot affect South West Africa's territorial integrity or its status as a separate international entity.

23. The record of history shows that the transfer of administration of the Eastern Caprivi was made because of Respondent's desire to achieve more effective administration and to serve the best interests of the inhabitants of the area, and that there is no substance in Applicants' suggestion that such transfer is indicative of an intention to incorporate the Territory or a part thereof. In fact Respondent had itself intimated to the League of Nations that the administrative arrangements of the Eastern Caprivi were "subject to the terms of the Mandate" [1]. And the Permanent Mandates Commission held the view that the arrangement *"calls for no observations on its part provided all the provisions of the Mandate are properly applied"* [2].

24. Moreover, as already pointed out [3], there is less administrative separation at present than there was during the period 1939-1955. Since 1955 Respondent has, through its Minister of Native Affairs, (now designated the Minister of Bantu Administration and Development), been in direct control of Native Affairs generally, both in the Eastern Caprivi Zipfel, and in the rest of South West Africa. Only certain limited aspects of government affecting Natives in the rest of South West Africa are controlled by Respondent through the Administrator.

H. The Views of the Committee on South West Africa, as Endorsed by Applicants

25. Applicants say that the Committee on South West Africa in its 1955 report "condemned this separation as a violation of the Mandate" [4]. In the first place Respondent denies that the Committee found a violation of the Mandate. What the Committee in fact did was to *question*—

> ". . . whether the administrative separation of any section of the Territory is conducive to the attainment of the objectives of the Mandate System [5]".

The Committee was *of the opinion*—

> ". . . that such a separation is likely to prejudice consideration *(b)* of the 'General Conditions which must be fulfilled before the Mandates regime can be brought to an end in respect of a country placed under that regime', approved by the Council of the League on 4 September 1931, namely, that 'It (the Territory) must be capable of maintaining its territorial integrity and political independence' [6]".

And the Committee *considered*—

> ". . . that any administrative separation of any portion of the Man-

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[1] *Vide* para. 17, *supra*.
[2] *Ibid.*, para. 18.
[3] In paras. 20 and 21, *supra*.
[4] I, p. 193.
[5] *G.A., O.R., Tenth Sess., Sup.* No. 12 (A/2913), p. 10; I, p. 193.
[6] *Ibid.* Also I, pp. 193-194.

dated Territory would place obstacles in the way of the fulfillment of this important condition laid down by the League of Nations [1]".

There was clearly no condemnation of separate administration "as a violation of the Mandate".

26. The aforementioned "General Conditions" referred to by the Committee were formulated in response to a resolution by the Council of the League of Nations, dated 13 January 1930, which read as follows:

> "Being anxious to determine what general conditions must be fulfilled before the mandate regime can be brought to an end in respect of a country placed under that regime, and with a view to such decisions as it may be called upon to take on this matter, the Council, subject to any other enquiries it may think necessary, requests the Mandates Commission to submit any suggestions that may assist the Council in coming to a conclusion [2]."

The answer of the Mandates Commission was as follows:

> "The Mandates Commission is of opinion that the emancipation of a territory under the mandate regime should be made dependent on two classes of preliminary conditions:
>
> (i) the existence in the territory concerned of *de facto* conditions which justify the presumption that the country has reached the stage of development at which a people has become able, in the words of Article 22 of the Covenant, 'to stand by itself under the strenuous conditions of the modern world';
>
> (ii) *certain guarantees* to be furnished by the territory desirous of emancipation to the satisfaction of the League of Nations, in whose name the mandate was conferred and has been exercised by the Mandatory [3]."

After stating certain general considerations regarding the question—

> "Whether a people which has hitherto been under tutelage has become fit to stand alone without the advice and assistance of a mandatory . . .",

the Commission concluded as follows:

> "Subject to these general considerations, the Commission suggests that the following conditions must be fulfilled before a mandated territory can be released from the mandatory regime—conditions which must apply to the whole of the territory and its population:
>
> *(a)* it must have a settled Government and an administration capable of maintaining the regular operation of essential government services;
>
> *(b)* *it must be capable of maintaining its territorial integrity and political independence;*
>
> *(c)* it must be able to maintain the public peace throughout the whole territory;
>
> *(d)* it must have at its disposal adequate financial resources to provide regularly for normal government requirements;

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[1] *G.A., O.R., Tenth Sess., Sup.* No. 12 (A/2913), p. 10. Also I, p. 194.
[2] *L. of N., O.J.*, 1930 (No. 2), p. 77.
[3] *P.M.C., Min.*, XX, p. 228 (Annex 16).

(e) it must possess laws and a judicial organisation which will afford equal and regular justice to all [1]." (Italics added.)

27. It is obvious, Respondent submits, that condition *(b)*, to which the Committee on South West Africa referred, concerns the ability of a territory to maintain its territorial integrity and political independence *after having been granted independence*, in the same way as the other conditions refer to the ability of such a territory to maintain essential services, public peace, etc.

In the premises, Respondent submits that the said condition was intended to arise for consideration only when it is proposed to bring the mandatory regime in respect of a particular territory to an end by the grant of independence. It would, for example, have no application in a case where the mandatory regime in respect of a territory is terminated by lawful incorporation of that territory in another independent State. And its application would be of a qualified nature if, for example, partition is lawfully brought about in the process of permitting each of different population groups to achieve self-determination.

In so far as the said condition may at all be relevant in the consideration of the propriety or otherwise of an act performed in the administration of a mandated territory the ultimate destiny of which has not yet been determined, it cannot serve as a ground for questioning such an act *unless the purpose of the act is unlawful*—e.g., unilateral annexation or incorporation, as to which see Chapter I, paragraphs 5 to 10, *supra*, or which is intended to frustrate or impede political advancement towards possible self-determination, as to which see Chapter I, paragraphs 11 to 21, *supra*.

28. The Committee on South West Africa did not question Respondent's *purpose* in providing for the Administration of the Eastern Caprivi by the Minister of Native Affairs. The Committee merely expressed the opinion that "administrative separation would place obstacles in the way of the fulfillment of this important condition"—i.e., the condition dealt with in paragraph 27, *supra*—without stating in which way the arrangements relative to the administration of the Eastern Caprivi could interfere with the advancement of the peoples of that area towards political maturity and the exercise of possible self-determination.

Respondent in any event denies that the transfer of the administration of the Eastern Caprivi to the Minister of Native Affairs, taking into consideration the sound reasons which motivated such action, as well as the present stage of development of the inhabitants of the area, is likely to prejudice the political advancement of the peoples of the area, whatever the ultimate destiny of the Territory may be. On the contrary, the superior administration which has been made possible by the said transfer of administration, is a positive contribution towards progress generally, including the political advancement of such peoples.

29. Applicants also endorse the views of the Committee with regard to the reason advanced for placing the Eastern Caprivi under the administration of the Minister of Native Affairs. The Committee, in questioning the reason advanced, referred to a statement by the South African Prime

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[1] *P.M.C., Min.*, XX, pp. 228-229.

Minister in Parliament on 1 June 1951. The Prime Minister's statement was as follows:

> "The western part borders on South-West Africa and came under the South-West Africa Administration and under the courts of South-West Africa, but for administrative reasons the eastern part was placed under the Union's administration. It was not annexed to the Union, but just as an understanding existed—a ruling—that Walvis Bay, which is Union territory and does not belong to South-West Africa, was for administrative purposes placed under the control of South-West Africa, so the eastern part of the Caprivi Strip for administrative reasons was placed under the Union Government. The reason for this is that the eastern part of the Caprivi Strip is virtually inaccessible to South-West Africa. To get there it is necessary to go through Bechuanaland, and perhaps even also around the Zambesi and beyond it. It was practically inaccessible, and it was almost impossible, or in any case inconvenient, to have court sessions in that area when you had to get your witnesses from South-West Africa. Therefore, it is proposed here to legalise the existing state of affairs, because the whole Caprivi Strip belongs territorially to South-West Africa. It is proposed here to place a section of it, namely, the eastern section of the Caprivi Strip, under the administration of the Union Government both for judicial and administrative purposes. That is what the Bill contains and all its clauses are practically self-explanatory [1]."

30. The Committee, it should be noted, did not *reject* the reason given by the Prime Minister, as alleged by Applicants, but merely stated that, as the Eastern Caprivi could be reached from the administrative centres of South Africa only through non-Union territories, it was—

> ". . . not *convinced* that the direct administration of the region by the Union has, in fact, made it more accessible to the centre of administration [2]". (Italics added.)

Furthermore, in making this statement, the Committee was probably not as fully informed as the Permanent Mandates Commission had been, and therefore probably did not appreciate adequately the nature and implications of the difficulties concerning communication with, and accessibility of, the Eastern Caprivi. It is entirely erroneous to suggest that the area can be reached as easily from the rest of South West Africa as from the administrative centre of Respondent in South Africa. Even at the present time there is no direct communication between the Eastern Caprivi and the rest of South West Africa. The possibility of an overland route from the Police Zone of South West Africa through the Okavango Native territory and the Western Caprivi Zipfel to the Eastern Caprivi has been fully investigated, with a completely negative result. The geographical terrain is such that although the Mashi or Kwando river could with extreme difficulty be reached from Windhoek in approximately eight days, the swamps in the vicinity of the said river cannot be traversed. They are infested with crocodiles and hippopotami, and a bridge at least three miles in length would have to be constructed.

The shortest reliable communication—by rail, lorry and barge—from

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[1] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 76 (1951), Col. 8356.
[2] *G.A., O.R., Tenth Sess., Sup.* No. 12 (A/2913), p. 10.

the rest of South West Africa to the Eastern Caprivi is through the Republic of South Africa, Bechuanaland and Rhodesia—a journey which is some 1,500 miles longer than the distance from Respondent's administrative centre (Pretoria) to the Eastern Caprivi, and which takes two or more days longer to complete.

31. Communication by air between Windhoek and the Caprivi, as a medium for regular administrative contact, is also impracticable. The only air service which at one time could possibly have been utilized, operated weekly between Windhoek and Salisbury in Southern Rhodesia. No intermediate landings were provided for in this service, and the only regular transport service connecting Salisbury with Livingstone, the nearest centre of communication to the Caprivi, is by rail via Bulawayo, a distance of 586 miles. The only transport service between Livingstone and the Caprivi is provided by the Witwatersrand Native Labour Association, but it is not regular. Up to Kazangula the conveyance is by lorry and from there by barge. The said air service is no longer in operation.

32. Given the fact that the Eastern Caprivi is a Native Reserve, and that the Respondent is directly responsible for Native Affairs throughout the Territory, it would be illogical and make for unsatisfactory administration if Respondent were obliged to issue instructions to the South West Africa Administration, which would then experience greater difficulty in administering the area than if the administration were conducted directly from South Africa.

33. *In the premises Respondent submits that the views expressed by* the Committee on South West Africa, apparently without proper appreciation of the facts concerning the Eastern Caprivi and its inaccessibility to the rest of South West Africa, cannot, and in fact do not, serve as justification for Applicants' charge that the form of administration of the area is inconsistent with the status of the Territory.

I. The Alleged Frustration of Opportunities for Progress Towards Self-Determination

34. *In this regard Applicants make the allegation in their* Legal Conclusions and Summary [1], that Respondent's actions, including those relating to the administration of the Eastern Caprivi, frustrate the objective of the Mandate to "promote conditions under which the Territory's inhabitants may progress towards self-determination". Applicants have in no way developed this submission or spelled out their allegations. It is difficult to understand Applicants' allegation because, even where administration is entrusted to two or more administrators, each such administrator is an agent of Respondent, and acts in such capacity under Respondent's direction and control. In theory, therefore, it is difficult to conceive why Respondent should be less mindful of its responsibilities when acting through two agencies than when acting through one. Indeed, practical considerations, and the interests of the people concerned, may dictate separation of administration.

35. It has already been stated that administration of the Eastern Caprivi from Windhoek must of necessity be less effective than adminis-

[1] I, p. 195.

tration from Pretoria, and that the transfer of administration complained of had as its sole object the improvement of the administration and, consequently, the promotion of the well-being of the inhabitants of the area. In fact, as has already been stated [1], the transfer of administration of the Eastern Caprivi, was requested by the South West Africa Administration because it found that it could not administer the area effectively.

36. It must furthermore be borne in mind that the Eastern Caprivi is mainly inhabited by two tribes which have never had connections with other Native groups in South West Africa, and that the territory inhabited by them, being geographically almost completely isolated from the rest of South West Africa, has problems peculiarly its own.

The inhabitants of the area have not yet advanced to a stage of political maturity, but in the meantime they are, in the same manner as other Native groups in the Territory, being gradually educated to play an ever-increasing part in the control and management of their own affairs.

37. Since 1955, as has been shown above [2], there has been less administrative separation than there was over the period 1939 to 1955. Such administrative differences as do exist at present can in no way interfere with the political and general advancement of the Caprivi people towards possible self-determination, and do not frustrate opportunities for progress in that direction.

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[1] *Vide* para. 15, *supra*.
[2] *Ibid.*, paras. 20-21.

CHAPTER VII

THE TRANSFER OF ADMINISTRATION OF NATIVE AFFAIRS TO THE MINISTER OF BANTU ADMINISTRATION AND DEVELOPMENT, AND THE VESTING OF SOUTH WEST AFRICAN NATIVE RESERVE LAND IN THE SOUTH AFRICAN NATIVE TRUST

A. Introductory

1. Applicants allege that the above two actions are to be regarded as—

> ". . . elements of the plan to incorporate the Territory into the Union, in this case through direct Union control of territorial land and development and direct control of the Territory's 'native' inhabitants."

It is alleged, also, that—

> "Transfer of 'Native' affairs to an agency external to the Territory, and vesting 'Native' lands in a corporate body external to the Territory cannot be reconciled with the international status of the Territory [1]."

And the submission is made that the said actions—

> ". . . are elements of a plan for political integration of the Territory, and that they tend substantially to impede progress toward the objectives of the Mandate [2]".

Respondent denies that these actions are elements of any plan as is alleged by Applicants, and denies the existence of any such plan. Respondent further denies that the said actions are inconsistent with the international status of the Territory, and denies that they impede progress towards the objectives of the Mandate.

For convenience the two matters referred to by Applicants are dealt with separately hereinafter.

B. Transfer of Administration of Native Affairs to the Minister of Bantu Administration and Development

2. Respondent submits that, under the full powers of administration granted to it by the Mandate, it can, in law, decide on the manner of administration of all aspects of government in the Territory, including Native affairs. It can, if it considers it to the advantage of the Native inhabitants of the Territory, carry on such administration directly, or through such agency as it deems expedient from time to time and as circumstances may require.

3. It has already been indicated [3] that, save for special provisions with regard to the area known as the Eastern Caprivi Zipfel, Respondent,

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[1] I, p. 194.
[2] *Ibid.*, p. 195.
[3] *Vide* Chapter VI, para. 3, *supra*.

from the very inception of the Mandate, assumed direct control of Native affairs in South West Africa. This position was maintained in the South West Africa Constitution Act, 1925 (Act No. 42 of 1925), which excluded Native affairs from the competence of the Legislative Assembly of South West Africa, the Administrator continuing to act in respect thereof under the direction and control of the Governor-General-in-Council.

The effect of the South West Africa Native Affairs Administration Act, 1954 (Act No. 56 of 1954), as already pointed out [1], was merely that, whereas prior to the passing of the Act the Governor-General-in-Council controlled and directed the administration of Native affairs in the Territory through its organ or agent, the Administrator, it has, since the Act has come into force, controlled and directed such administration through another organ or agent, the Minister of Native Affairs (now designated the Minister of Bantu Administration and Development).

4. Respondent submits that the transfer of the administration of Native Affairs from one organ, or agent, of the State to another can in no way affect the international status of the Territory, and, also, that it can in no way amount to integration not permissible in terms of the Mandate. It is submitted, furthermore, that the choice of the organ, or agent, through which the administration of Native affairs is to be conducted is a matter which has, from the very inception of the Mandate, lain entirely in the discretion of Respondent.

5. The said transfer was effected because it was felt that the Territory would benefit if the administration of Native affairs therein were put in the hands of the Department of Native Affairs (now called the Department of Bantu Administration and Development), with all its experience, its expert personnel and its technical and other facilities. The sole task of this Department has at all times been the promotion of the interests, and the development and uplifting, of the Native population of South Africa, and since the aforementioned transfer was effected, also of the Native population of South West Africa.

6. The aim of Act No. 56 of 1954 was described as follows by the Minister of Native Affairs during a debate in the South African Parliament:

> "The aim of this Bill is very simple. The Union is responsible for Native affairs in South West Africa. At the moment the Union is carrying out this task through the administrator acting as a representative of the Union Government. I do not even intend bringing about any change in the machinery. In the future the Administrator will still be used to carry out the tasks which should be carried out by someone on the spot [2]."

Earlier, in the course of his address, the Minister had said:

> "Actually I think this House should welcome this change for now it means that the Central Parliament is being given the opportunity to discuss properly such matters which under the mandate have become the task and the duty of the Union. This Parliament will be able to call someone to account in connection with matters which

[1] *Vide* Chapter VI, para. 3, *supra*.
[2] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 86 (1954), Col. 6458.

have to be done by the Union. In any case, for the reasons it was then decided to transfer to the Minister of Native Affairs full control over Native affairs in the territory of South West Africa [1]."

7. Respondent has already referred to the explanation given by its representative to the Fourth Committee of the United Nations in 1954 regarding the object and purpose of the Act [2]. Respondent wishes to cite here only the following extract from the statement then made:

> ". . . the transfer of control over Native affairs from the Administrator of South West Africa to the Minister of Native Affairs of the Union of South Africa . . . would not result in the abolition or diminution of any service now rendered to South West Africa. On the contrary, with its greater resources in money, manpower and experience, the Government of South Africa would be able to increase and improve those services in every way. *Furthermore, the South West Africa Administration and the Ministry of Native Affairs were both agencies of the South African Government and it was therefore hard to understand how the South African Government would be less mindful of its responsibilities under Article 22 of the Covenant while acting through one than while acting through the other . . . He therefore wished to stress that there had been no incorporation of South West Africa by the Union and no annexation to the Union* [3]." (Italics added.)

8. With regard to Applicants' allegation that the transfer of administration tends "substantially to impede progress toward the objectives of the Mandate" [4] Respondent denies that it has any such effect, or that it can in any way be construed as a violation of Respondent's obligations under Article 22 of the Covenant and Article 2 of the Mandate.

On the contrary, the transfer was intended, and has had the effect of operating, for the benefit of the indigenous population, especially by providing for an accelerated rate of development of the Native reserves in pursuance of valuable experience gained by the Department in a similar sphere in South Africa [5], and by encouraging and assisting the various groups towards an ever-increasing participation in the building up of their reserves and in the processes of self-government therein [6]. Thus the change has promoted, not impeded, progress towards the objectives of the Mandate.

9. It may be pointed out, finally, that the Minister of Native Affairs possesses authority to delegate any of his powers and duties to the Administrator of South West Africa in his capacity as a member of the Native Affairs Commission [7]. The Minister has in fact exercised that authority in delegating certain of his functions and duties in respect of Native affairs in South West Africa to the Administrator in his aforesaid capacity.

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[1] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 86 (1954), Col. 6456.

[2] *Vide* Chapter II, para. 22, *supra*.

[3] *G.A., O.R., Ninth Session, Fourth Comm.*, 407th Meeting, 15 Oct. 1954, pp. 69-70.

[4] I, p. 195.

[5] *Vide*, e.g., paras. 21-23, *infra*.

[6] *Ibid.*, para. 31.

[7] Sec. 3 (3) of Act No. 55 of 1959 superseding sec. 2 (2) of Act No. 23 of 1920.

C. The Vesting of South West African Native Reserve Land in the South African Native Trust

10. In support of their allegations in the above connection, Applicants cite, and endorse, what they term "relevant principles" set forth in the 1955 report of the Committee on South West Africa with reference to a resolution of the Permanent Mandates Commission of 7 July 1924 [1]. Before dealing with the views expressed by the Committee on South West Africa, it will be convenient first to consider the following matters, namely:

I. the resolution of the Permanent Mandates Commission of 7 July 1924;
II. the objects and purpose of the South African Native Trust; and
III. the effect of the vesting of South West African Native Reserve Land in the said Trust.

These matters will be dealt in the above order in the next succeeding paragraphs.

I. The Resolution of the Permanant Mandates Commission of 7 July 1924

11. Articles 120 and 257 of the Treaty of Versailles provided as follows:

Article 120:

"All movable and immovable property in such territories belonging to the German Empire or to any German State shall pass to the Government exercising authority over such territories, on the terms laid down in Article 257 of Part IX (Financial Clauses) of the present Treaty . . ."

Article 257:

"In the case of the former German territories, including colonies, protectorates or dependencies administered by a Mandatory under Article 22 of Part I (League of Nations) of the present Treaty . . .

All property and possessions belonging to the German Empire or to the German States situated in such territories shall be transferred with the territories to the Mandatory Power in its capacity as such and no payment shall be made nor any credit given to those Governments in consideration of this transfer . . ."

12. The nature of the legal rights vesting in the Mandatories over immovable property in the mandated territories was considered during the first few years of the League's existence. In a report submitted during the Third Session of the Permanent Mandates Commission in 1923 M. van Rees, in interpreting Articles 120 and 257 of the Treaty of Versailles, came to the conclusion that the transfer was to ". . . the mandatory Power as such" [2], and that—

"If these provisions are examined as a whole, it will be seen that under the mandate system the mandatory State is merely the governor of a territory which does not belong to it . . . This consideration excludes the possibility of the territory being regarded as legally the

[1] *P.M.C. Min.*, IV, p. 157; I, p. 194.

[2] *Ibid.*, III, p. 221 (Annex 2).

property of the mandatory Power and, consequently, as part of the Mandatory's territory.

That which has been handed over to the mandatory State in virtue of Articles 120 and 257, that which has 'passed' or been 'transferred' to the governor, has been handed over to him as governor and not as State; consequently, there has been no final alienation, and no real rights have been acquired by that State; the territory, property, possessions and rights referred to in the two articles do not belong to the mandatory State but have merely been placed at its disposal; it has been granted their use in order that it may carry out its duties as governor with which it has been entrusted [1]."

Referring to the legislative competence of the mandatory Powers, he concluded that—

"There can therefore be no doubt that the mandatory Power, if it conforms to Article 22 of the Covenant and grants the guarantees referred to in these mandates, possesses full authority, both as regards B and C mandated territories, *to govern them as if it possessed sovereign rights over the territory* [1]." (Italics added.)

In his general conclusions M. van Rees said:

"This duty of government, though it does not involve sovereignty or, any actual rights, over any portion of a territory . . . , does entail the right of disposal of the territory, property and possessions in question, but in a purely administrative sense [2].",

and

"Whatever may be the extent of the legislative competence of the Mandatory, there would appear to be no doubt that he could not deduce from that competence the right to take advantage of it so as to make the whole or part of the territory his own property . . . no enactment by those (mandatory) Powers can make any portion of the territories under their administration form part of the State lands of a mother-country. If, notwithstanding this, they issue decrees the text of which bears this construction, they give rise to a discrepancy which may be the cause of errors in interpretation.

Rather than foster these errors, it would surely be preferable to avoid any suggestion of acting in contravention of the intentions of the mandatory system [3]."

13. The aforementioned report was submitted to the legal section of the Secretariat of the League of Nations for its views on the following matters in question, viz.:

"(1) Is it in conformity with the principles underlying the mandate system for the Powers administering territories under 'B' and 'C' mandates to designate, by the terms 'Crown Land' or 'Domaine de l'Etat':

(a) property which formerly belonged to the German State; and

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[1] *P.M.C., Min.*, III, p. 221 (Annex 2).
[2] *Ibid.*, p. 222.
[3] *Ibid.*, pp. 222-223.

(b) land known as 'vacant land' and land generally regarded as constituting native reserves?

(2) Would it be legitimate for the Powers above mentioned to use sums of money derived from the sale or exploitation of such lands for any purposes other than the interests of the Mandated territories? [1]"

14. The views of the legal section of the Secretariat were expressed in a memorandum dated 20 May 1924. This memorandum referred to Articles 120 and 257 of the Treaty of Versailles, Article 22 of the Covenant and the relevant Articles of the Mandates, and stated the following conclusion:

"... it is only as *Mandatories* that the Powers in question have obtained the cession of the territory and the transfer of the property in question. It is not as owners that these Powers have acquired the property, but as trustees ... who only possess powers of management. ... the right over lands and other public property has not become a right of absolute ownership such as that which the State possesses over State domains in its own territory. The fact that the State is a 'Mandatory' implies restrictions which qualify the absolute character of such rights, namely:

(1) a restriction as to duration; the right exists only so long as the State continues to be the Mandatory Power;

(2) restrictions as to enjoyment in substance. If the right of ownership is taken to mean the right to dispose freely of the property in question and to enjoy its yield without restriction, property situated in mandated territories is not so completely at the disposal of the Mandatory, and the latter does not possess the free, unfettered and unconditional use of the yield of such property [2]."

And:

"It therefore follows that the right of the Mandatory Power to dispose of or obtain any profit from the State lands in the mandated territory is subject to the following obligation: the Mandatory Power must exercise this right with a view to furthering the prosperity and development of the mandated territory as a whole [3]."

The result in practice of the aforegoing principles was described in the memorandum as follows:

"... first, the State lands situated in the mandated territories cannot form a integral part of the *heritage* of the Mandatory Power regarded as a whole.

Secondly, profits and revenues obtained from such property cannot be included, unless they are specially earmarked, in the general revenue of the Mandatory Power [3]."

15. The memorandum continued by stating that, especially in the case of C Mandates, which were "administered under the laws of the mandatory *as integral portions of its territory*", certain difficulties of a practical nature, from an administrative point of view, might arise in

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[1] *P.M.C., Min.*, IV, p. 163 (Annex 1).
[2] *Ibid.*, p. 164.
[3] *Ibid.*, p. 165.

connection with the abovementioned principles. With regard to such difficulties the memorandum stated:

> "The unity of administration which the Mandatory Power may establish does not imply, *ipso facto*, and in principle, the unification of all domain estates nor the amalgamation of public revenues—. . .
>
> But the administrative unity established as between the mandated territories and those over which Mandatory Power has full sovereignty may call for special examination from the point of view of the manner in which the distinct character of the State lands held under the Mandate is to be respected.
>
> This is, however, a question of practical administration . . . It should be sufficient to note that an administrative solution of the question would not seem to be impossible [1]."

Regarding the terminology employed by various Mandatory Powers to describe land in the territories held under mandate, the memorandum stressed that no final opinion could be formed purely on terminology, but that the system of legislation and administration, "as a whole", would have to be examined in order to furnish an answer to the question whether such system accorded with the principles defined in the memorandum [2].

16. The aforesaid memorandum formed the basis of the resolution adopted by the Permanent Mandates Commission on 7 July 1924 and endorsed by the Council of the League, which is quoted by Applicants [3]. For convenience the resolution is cited here:

> "The mandatory Powers do not possess, in virtue of Articles 120 and 257 (paragraph 2) of the Treaty of Versailles, any right over any part of the territory under mandate other than that resulting from their having been entrusted with the administration of the territory.
>
> If any legislative provision relating to land tenure should lead to conclusions contrary to these principles, it would be desirable that the text should be modified in order not to allow of any doubt [4]."

17. Respondent has at all times accepted the legal position as set out in the said resolution and in the memorandum of the legal section of the Secretariat of the League, viz., that Respondent did not receive "absolute ownership" of the land in question, but that it ". . . obtained the cession of the territory and the transfer of the property in question [5]" only in its capacity as Mandatory, or trustee, with powers of management and administration. Respondent has, furthermore, at all times acted on the principles set out in the legal section's memorandum, viz., that whilst it has the power to dispose of "state lands", such right is subject to the obligation of using the proceeds for "furthering the prosperity and development of the mandated territory as a whole" [6].

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[1] *P.M.C., Min.*, IV, p. 165 (Annex 1).
[2] *Ibid.*, p. 167.
[3] I, p. 194.
[4] *P.M.C., Min.*, IV, p. 157.
[5] *Ibid.*, p. 164. *Vide* also para. 14, *supra*.
[6] *Vide* para. 14, *supra*.

II. The Objects and Purpose of the South African Native Trust

18. In the 1930s it became clear to the South African Government that the acquisition, holding and development of lands already set aside, and to be set aside, for the sole use and occupation of the various Native groups in South Africa called for the establishment of a specialized body to perform these functions. With this purpose in view the Native Trust and Land Act, 1936 (Act No. 18 of 1936), created a corporate body, a specialized government agency, namely the South African Native Trust, which was to be "administered for the settlement, support, benefit, and material and moral welfare of the natives of the Union" [1]. In terms of the Act the affairs of the Trust were to be—

> "... administered by the Governor-General as Trustee with power ... to delegate any of his powers and functions as Trustee to the Minister [of Native Affairs] who shall act in consultation with the Native Affairs Commission [2]."

Pursuant to this provision the Governor-General delegated his powers and functions as trustee to the Minister of Native Affairs (now designated the Minister of Bantu Administration and Development) who is a member of Respondent's Executive Council. The staff of the trust are government officials employed under the provisions of the laws governing the public service [3].

The trust is, therefore, an administrative organ which functions under the sole control of Respondent, in furtherance of the trust objectives prescribed in the Act.

19. Section 6 of the said Act made provision for the vesting in the Trust of, *inter alia*, all land set aside for the occupation of Natives.

Section 8 provided for the establishment of the South African Native Trust Fund, to be administered for the purposes of the trust, and section 9, as amended, provided that this fund may be utilized for the following purposes:

"*(a)* to defray such costs in connection with the administration of the Trust and such other expenditure as the Minister may determine;

(b) to acquire land for the objects of the Trust;

(c) to develop land, the property of the Trust;

(d) to advance the interests of natives in scheduled native areas, released areas [being certain types of land for the occupation of Natives], or on land held by or from the Trust in the agricultural and pastoral and other industries;

(e) to make advances to natives or to native communities occupying land within the scheduled native areas or released areas or holding land from the Trust, for the better development of the holdings of such natives or of the areas occupied by such communities;

(f) to advance the interests of natives in commerce and industry in scheduled native areas or released areas or on land held by the

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[1] Act No. 18 of 1936, sec. 4 (2), in *The Union Statutes 1910-1947*, Vol. 10, p. 191.

[2] *Ibid.*, sec. 4 (3), p. 191.

[3] *Ibid.*, sec. 6 *bis*, p. 193. This sub-section was inserted by sec. 26 (1) of the Finance Act, No. 17 of 1938.

Trust in the Union or the territory of South-West Africa and, subject to such conditions as the Trustee may determine, to provide moneys to be used for that purpose by any body established by Act of Parliament; and

(g) generally to assist and develop the material, moral and social well-being of natives residing on land within the said areas or on land held by or from the Trust; [1]."

20. The trust was to be financed by special parliamentary grants amounting to £10 million (R20 million) over a period of ten years for the purpose of acquiring and developing, on behalf of the Native population of South Africa, the additional 7¼ million morgen (± 15,500,000 acres) of land, which in terms of the Act were to be added to the existing Native Reserves in South Africa.

21. In order to implement the provisions of the Act, administrative and technical machinery staffed by specially selected officials was set up within the Department of Native Affairs consisting of a Lands' Branch, an Agricultural Branch and a Native Settlement Section.

22. In furtherance of its objectives the trust has acquired extensive areas of land for the sole use and occupation of Natives in South Africa. It has also, acting through the Department of Native Affairs (now styled the Department of Bantu Administration and Development), brought about large-scale developments and improvements within the Bantu areas, more particularly in the following respects:

(a) development and conservation of rural areas by combating soil erosion, and other reclamation operations;
(b) afforestation of rural areas;
(c) fencing of lands;
(d) provision of irrigation and water conservation schemes, boreholes, windmills, pumps, reservoirs and tanks;
(e) construction and improvement of roads and building of bridges;
(f) improvement of agricultural methods, provision for proper veterinary services in combating stock diseases, and promotion of various schemes for agro-economic development;
(g) planning and establishing Bantu villages and townships and promoting industries in border areas.

23. In all the aforementioned schemes, operations and services for the betterment of the Bantu in South Africa and for promoting their progress at an ever increasing tempo, the South African Native Trust has played a very important role.

There has, furthermore, been created an administrative organization of vast experience, commanding the services of expert personnel and possessing proper machinery and equipment for the diverse tasks and fields of operation in which the Trust is interested on behalf of the Bantu in South Africa. In the course of time the organization has concentrated more and more, with an ever-increasing measure of success, upon securing the active co-operation of the traditionally organized Bantu communities in the planning and application of these schemes and measures for the

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[1] Act No. 18 of 1936, sec. 9, p. 195. Sub-section 9 *(f)* was inserted by sec. 2 of the Native Trust and Land Amendment Act, No. 41 of 1958; *vide The Laws of South West Africa 1958*, Vol. XXXVII, p. 95.

development of the Bantu areas and the uplift and advancement of the Bantu peoples.

III. The Effect of Vesting South West African Native Reserve Land in the South African Native Trust

24. In 1954 it was felt that a stage had been reached where the further development of Native reserves in South West Africa required the aid and expert services of a specialized body such as the South African Native Trust. Provision was accordingly made in the South West Africa Native Affairs Administration Act, 1954 (Act No. 56 of 1954) [1], for the vesting in the said trust of all land set aside for the sole use and occupation of Natives in the Territory. The Act provides that with regard to land so vested the trustee shall, "subject to the provisions of this Act, have the same powers and functions, and be subject to the same duties, as if the territory were included in the Union" [2]. Further provisions render clear that the trust is in respect of such land to operate for the benefit of the Native inhabitants of South West Africa only [3]. Provision is consequently made for a separation of funds accruing to the trust in respect of South West Africa, and the keeping of separate accounts in respect thereof [4].

25. On analysis of the system under which Reserve Lands are held by the Trust it appears that:

(a) The South African Native Trust is not vested with a right of full and unfettered ownership.

The following restrictions prevent the trust from dealing with Reserve lands as if it were the absolute owner thereof:

(i) The trust must, as pointed out before, be "administered for the settlement, support, benefit, and material and moral welfare of the natives" [5]. This is in conformity with the principles of the mandate system.

(ii) No land in a Native Reserve vested in the trust may be alienated except with the approval of both Houses of the South African Parliament and unless land "of at least an equivalent pastoral or agricultural value . . . [is] reserved or set apart, in terms of any law in force in the territory, for the sole use and occupation of natives" [6]. This provision incorporates even stronger safeguards of the rights of Natives in the Reserves than existed prior to 1954. Prior to 1954 an alienation of Native Reserve land could have been legally authorized by the two Houses without any *quid pro quo*, although this was never done in practice [7].

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[1] It is the same Act which made provision for the transfer of administration of Native Affairs in South West Africa to the Minister of Bantu Administration and Development. *Vide* para. 3, *supra*.

[2] Act No. 56 of 1954, sec. 4 (2) *(a)*, in *Statutes of the Union of South Africa 1954*, p. 561.

[3] *Ibid.*, sec. 4 (2), pp. 561-563.

[4] *Ibid.*, sec. 4 (4), p. 563.

[5] *Vide* para. 18, *supra*.

[6] Act No. 56 of 1954, sec. 5 (1), in *Statutes of the Union of South Africa 1954*, p. 563.

[7] Act No. 49 of 1919, sec. 4 (3), in *The Laws of South West Africa 1915-1922*, p. 12.

(b) The Native Reserves of the Territory are held in trust on behalf of Respondent as trustee for the Native inhabitants of the Territory, and are in no way identified with Respondent's own Native areas kept in trust for the Native population of South Africa. All profits and revenues obtained, and all expenditure incurred, in respect of the South West Africa Reserves, are accounted for in separate accounts by the trust. And all benefits derived from the said Reserves are employed only for the benefit of the Natives of South West Africa in accordance with the strict purpose of the trust [1].

(c) The position is thus that the South African Native Trust, with the Minister of Bantu Administration and Development acting as trustee under delegated authority from the Governor-General, holds and administers the said Reserves merely as a trustee for the benefit of the Natives occupying the said Reserves.

D. The Views of the Committee on South West Africa, as Endorsed by Applicants

26. In its 1955 report the Committee on South West Africa, in dealing with the provisions of Act No. 56 of 1954, referred to the resolution of the Permanent Mandates Commission of 7 July 1924 [2], and expressed the opinion that:

> "... the Mandate does not and can in no way be interpreted to confer upon the Mandatory Power the authority to divest the Mandated Territory of any portion of its assets [3]."

This opinion was reiterated by the Committee in its 1956 report in which it stated that the assets of the Territory: "... cannot be vested in any source other than the Mandated Territory itself" [4]. Applicants say that they fully endorse the opinion of the Committee.

27. The suggestion underlying the opinion of the Committee appears to be that in law the lands in question vest in the mandated territory, and cannot legally be divested from the Territory.

Respondent submits that this view is incorrect. The lands in question, as part of the Territory of South West Africa, were originally transferred to Respondent as Mandatory or trustee [5], and they have at all times remained so vested.

Being vested in Respondent, and not in the Territory—which is in any event not a legal *persona*—there can be no question of such lands being divested from the Territory. The effect of the Act has merely been to appoint a specialized agency, under Respondent's control, to manage the lands in trust for the benefit of the natives concerned.

28. Applicants, in endorsing the opinion of the Committee on South West Africa, complain that the legislative measure in question brought about "direct Union control of territorial land and development" and that the vesting of " 'Native' lands in a corporate body external to the

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[1] Act No. 56 of 1954, secs. 4 (3) and (4), in *Statutes of the Union of South Africa 1954*, p. 563; *vide* para. 24, *supra*.

[2] For the text of the resolution *vide* para. 16, *supra*.

[3] *G.A., O.R., Tenth Session, Sup.* No. 12 (A/2913), p. 16.

[4] *Ibid., Eleventh Session, Sup.* No. 12 (A/3151), pp. 11-12.

[5] *Vide* paras. 11-15, *supra*.

Territory cannot be reconciled with the international status of the Territory" [1].

In this regard Respondent says that it has, in its capacity as Mandatory, at all times had direct control of "territorial land and development", and that Applicants' objection to direct control by Respondent is an untenable one. It was inherent in the Mandate that Respondent, as Mandatory, should control and develop the Territory, and there can, it is submitted, be no objection to Respondent's performing its duties in this respect directly. Applicants, in referring to the South African Native Trust as a "corporate body external to the Territory", seem to suggest that control and development must proceed from a source within the Territory itself. There can, it is submitted, be no basis for such a suggestion, since any such source within the Territory must of necessity derive its powers from Respondent as Mandatory, and would therefore be an agent of Respondent, under Respondent's control. It cannot validly be suggested that an agent of Respondent within the Territory should be able to do that which Respondent, as the principal which appoints such agent, cannot itself do.

29. The vesting of South West African Native Reserve lands in the South African Native Trust was a purely administrative enactment which in no way affected the distinct character of the said reserves as portion of the Territory of South West Africa, which Territory is administered by Respondent as a territory with a separate international status. The arrangement complained of can in no way be taken to amount to an incorporation of the said reserves into the patrimony of Respondent.

E. Applicants' Allegation that the Measure in Question Is an Element "of a Plan for Political Integration of the Territory" and that it Tends "Substantially to Impede Progress Toward the Objectives of the Mandate" [2]

30. Respondent does not appreciate on what grounds Applicants suggest that the vesting of South West African Native Reserve land in the South African Native Trust is part of a plan for "political integration of the Territory", or that it tends to "impede progress towards the objectives of the Mandate".

Respondent submits that the very object and purposes of the trust [3] demonstrate that it is solely concerned with the advancement of the interests of Natives, and thus refute the suggestion that the measure in question is part of a plan for "political incorporation".

And the activities of the trust [4] likewise, in Respondent's submission, refute the idea that it operates so as to impede "progress towards the objectives of the Mandate".

31. Recognition of the important role which the trust has played in the preservation and improvement of the Bantu areas in South Africa, and in the promotion generally of the interests of the Bantu peoples, entirely justified the extension of the Trust's activities to South West Africa in the interests of the Native population of the Territory.

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[1] I, p. 194.
[2] *Ibid.*, p. 195.
[3] *Vide* paras. 18-20, *supra*.
[4] *Ibid.*, paras. 21-23.

That such extension has proved of immense value to the Native Reserves in the Territory is evidenced by the measure of progress which has been made in developing such reserves since 1955, particulars of which have already been furnished elsewhere in this Counter-Memorial in reply to Applicants' charges set forth in Chapter V of the Memorials.

32. In the premises aforestated Respondent submits that Applicants' allegations and complaints relative to the vesting of South West African Native Reserve lands in the South African Native Trust are entirely unfounded.

CHAPTER VIII

CONCLUSION

1. In the light of what has been stated in the aforegoing Chapters, Respondent submits that there is no foundation for the conclusions drawn by Applicants in section C of Chapter VIII of their Memorials [1].

Respondent specifically denies the charge that its purpose is to disregard the "mandate's prohibition against unilateral incorporation of the Territory, or any other modification of the Territory's status".

Respondent further denies the charge that it has by any of the acts referred to by Applicants, or otherwise, frustrated the objective "to promote conditions under which the Territory's inhabitants may progress toward self-determination".

2. In the premises Respondent denies Applicants' conclusion that Respondent "has violated, and is violating, its international obligations stated in Article 22 of the Covenant of the League of Nations and in Article 2 of the Mandate".

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[1] I, p. 195.

CHAPTER IX

SUBMISSION

For the reasons hereinbefore advanced, supplemented as may be necessary in later stages of these proceedings, Respondent, as far as this portion of the Counter-Memorial is concerned, prays and requests that Applicants' Submission 5 be dismissed.

SECTION D

ALLEGED VIOLATIONS OF ARTICLE 7 OF THE MANDATE

A. INTRODUCTORY

1. In their Submission 9, Applicants ask the Court to adjudge and declare that:

> "the Union, by virtue of the acts described in Chapters V, VI, VII and VIII of this Memorial coupled with its intent as recounted herein, has attempted to modify substantially the terms of the Mandate, without the consent of the United Nations; that such attempt is in violation of its duties as stated in Article 7 of the Mandate and Article 22 of the Covenant; and that the consent of the United Nations is a necessary prerequisite and condition precedent to attempts on the part of the Union directly or indirectly to modify the terms of the Mandate [1]."

The argument in support of this Submission [2] may be summarized as follows:

(a) In terms of Article 7 of the Mandate—

> "The consent of the Council of the League of Nations is required for *any modification* of the terms of the present Mandate."

(b) After the foundation of the United Nations Organization, and the dissolution of the League, the power to consent to any modification of the Mandate became vested in the United Nations.

(c) Respondent has proceeded from the assumption that the Mandate is no longer in existence, and that it has the right unilaterally to incorporate the Territory.

(d) Respondent has committed the violations of Articles 2, 4, 6 and 7 of the Mandate which are set out in Chapters V to VIII of the Memorials.

(e) The acts referred to in sub-paragraph *(d)* above—

> "read in the light of the Union's intent, [i.e., as set out in sub-paragraph *(c)*] constitute a unilateral attempt to modify the terms of the Mandate without the consent of the United Nations".

B. STATEMENT OF THE LAW

2. For the purposes of the present argument Respondent assumes, contrary to its Submission in Book II above [3], that the Mandate is still in existence despite the dissolution of the League of Nations.

3. In support of the proposition set out in paragraph 1 *(b)* above,

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[1] I, p. 198.
[2] *Ibid.*, p. 196.
[3] *Vide* Book II, Chap. V, of this Counter-Memorial.

Applicants rely entirely on the 1950 Advisory Opinion. The relevant passage of the said Opinion reads as follows:

> "Article 7 of the Mandate, in requiring the consent of the Council of the League of Nations for any modification of its terms, brought into operation for this purpose the same organ which was invested with powers of supervision in respect of the administration of the Mandates. In accordance with the reply given above to Question *(a)*, those powers of supervision now belong to the General Assembly of the United Nations. On the other hand, Articles 79 and 85 of the Charter require that a Trusteeship Agreement be concluded by the mandatory Power and approved by the General Assembly before the International Trusteeship System may be substituted for the Mandates System. These articles also give the General Assembly authority to approve alterations or amendments of Trusteeship Agreements. By analogy, it can be inferred that the same procedure is applicable to any modification of the international status of a territory under Mandate which would not have for its purpose the placing of the territory under the Trusteeship System [1]."

As appears from this passage, an essential link in the Court's reasoning was its previous finding that "powers of supervision in respect of the administration of the Mandates" were vested in the General Assembly of the United Nations. Respondent has submitted that this finding was incorrect [2]. If Respondent's submission in this regard is sound, it would follow that the said Advisory Opinion would no longer be acceptable authority for the proposition—"that it is the United Nations whose consent is now required for any modification of the terms of the Mandate" [3].

Respondent does not, however, propose devoting any further consideration to the questions whether, on the assumption aforestated [4], the Mandate can now be modified, and, if so, how, since these questions are, for the reasons to be set out in the succeeding paragraphs, of academic interest only.

C. STATEMENT OF FACTS

Respondent's Alleged Intent

4. Applicants appear to concede that, in order to establish a contravention of Article 7, they would be required to prove an intent on Respondent's part to modify the terms of the Mandate [5]. Indeed, it seems obvious that Respondent cannot be guilty of any "attempt to modify the terms of the Mandate" [3] unless, as a fact, it possessed the intent to effect such a modification.

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[1] *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128, at pp. 141-142.

[2] *Vide* Book II, Chap. IV, of this Counter-Memorial.

[3] I, p. 196.

[4] *Vide* para. 2, *supra*.

[5] *Vide* the heading "*The Union's Intent*", and the words "read in the light of the Union's intent" (twice) at I, p. 196, and "coupled with its intent" in Submission 9.

The only allegations from which Applicants seek to deduce such an intent are the assertions that Respondent—

> "... has proceeded from the assumption that the Mandate is no longer in existence, that the Union has no obligations under the Mandate, and that it has the right and the power unilaterally to incorporate the Territory by *de facto* annexation or otherwise [1]".

It is clear that a mere assertion of a right to do something, does not show an *intention* to do so [2]. Respondent submits, therefore, that Applicants' own allegations do not give rise to any inference that Respondent is, or has been, motivated by an intent to modify the terms of the Mandate.

Indeed, it is submitted that the record shows a complete absence of intent on Respondent's part to perform any actions in regard to the Territory which would not have been permissible under the Mandate if it had still been in force [3].

Respondent's Alleged Acts

5. Quite apart from what has been set out in paragraph 4 above, it is submitted that Respondent's replies to Chapters V, VI, VII and VIII of the Memorials show that Respondent has not violated Articles 2, 4, 6 or 7 of the Mandate, and, that for this reason also, Applicants' argument in Chapter IX of the Memorials is untenable.

D. SUBMISSION

6. For the reasons hereinbefore advanced, supplemented as may be necessary in later stages of these proceedings, Respondent, as far as this portion of the Counter-Memorial is concerned, prays and requests that Applicants' Submission 9 be dismissed.

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[1] I, p. 196.
[2] With regard to the right to incorporate, *vide* sec. C, Chap. III, para. 4, *supra*.
[3] *Vide* sec. C, Chap. II, para. 26, and Chap. III, para. 15, *supra*.

BOOK IX

A GLIMPSE OF SOUTH WEST AFRICA

The purpose of this Book is to present by means of photographs some measure of illustration of what has been described or mentioned in the text of the Counter-Memorial.

For practical reasons the presentation must necessarily be a limited one, affording no more than a glimpse of the whole field.

As will be observed from the titles, sub-titles and captions, many of which are extracts from the text, the photographs are grouped with reference to various subjects as dealt with in distinct portions of the Counter-Memorial, e.g., geographical features (Book III, Chap. I), population groups (Book III, Chap. II), education (Book VII, the whole) and the like. All subjects are not thus represented; and of those that are represented, some aspects only are illustrated.

Respondent hopes, however, that the Book may nevertheless succeed in conveying to the honourable Court something of the spirit and atmosphere of the land of diversity, its peoples and their lives.

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(3) *Kozonguizi to Louis Nelengani*, 12 Oct. 1959.
(4) *Kerina to Sam Nujoma*, 16 Sep. 1959; 25 Sep. 1959; 17 Oct. 1959; 9 Dec. 1959.
(5) *Kozonguizi to Sam Nujoma*, 14 Sep. 1959.
(6) *Kerina to Toivo Ja Toivo*, 9 Feb. 1959; 14 Feb. 1959; 21 Apr. 1959; 17 Nov. 1959.

XXXIX. Newspapers

(1) *Agence France Presse, Africa South of the Sahara*, No. 1012, 21 Oct. 1963.
(2) *Die Burger*, 4 Dec. 1925, pp. 7-8.
(3) *The Evening Post* (New Zealand), 4 Dec. 1962.
(4) *Ilanga Lase Natal*, 19 Nov. 1955, p. 15.
(5) *The Natal Mercury*, 14 Mar. 1963.
(6) *The Pretoria News*, 16 Dec. 1963, p. 1.
(7) *The Star*, 1 Dec. 1954, p. 9; 22 Sep. 1962; 15 Nov. 1962, p. 21; 28 Nov. 1962; 11 Dec. 1962, p. 7; 23 Feb. 1963.
(8) *Die Transvaler*, 19 Aug. 1955, p. 7.

XL. Map

Sheet 6 of Jeppe's Map of the Transvaal or South African Republic and Surrounding Territories.

XLI. Other

(1) *Articles of Association of New South West Africa Native Labour (Proprietary) Limited—Nuwe* S.W.A.N.L.A., pp. 6-7.
(2) *Deposition of Käthe von Löbenfelder,* 2 Feb. 1956.
(3) Statement of Silas Fikameni Ifumbu in regard to the detribalization of Ovambo labourers.
(4) *The Summit Conference of Independent African States, Resolutions, Official Text,* SUMMIT, CIAS/Plen. 2/Rev. 2, 25 May 1963, pp. 1-2.

SUPPLEMENT TO THE COUNTER-MEMORIAL

INTRODUCTORY

1. In Books IV and V of the Counter-Memorial, reference was made to a Commission of Experts [1] which had been appointed to investigate the conditions of the inhabitants of South West Africa, and particularly the non-White inhabitants, and to make recommendations in respect of their further advancement [2]. In this regard it was stated, *inter alia*:

> "The report of this Commission has been due for some months now and is expected to be published in the very near future. Unfortunately it has not become available at an early enough stage to be dealt with in this Counter-Memorial. In so far as its recommendations, and the Respondent Government's reactions thereto, will be relevant to the matters concerned in this case, Respondent will at a subsequent stage take the necessary steps, with the leave of the Court in so far as necessary, to present such information to the Court for its consideration [3]."

The Commission's report [4] was tabled in Parliament on 27 January 1964, and on 29 April 1964, the Respondent Government tabled a memorandum *setting out its attitude towards the Commission's recommendations* [5]. On 8 May 1964 the House of Assembly of the South African Parliament passed a resolution expressing approval of the Government's decisions contained in the memorandum.

2. The Odendaal Commission's report incorporates a comprehensive survey of the past development of and present conditions in South West Africa in the fields of government, economy, education and other aspects of political, social and material well-being. In addition it contains the Commission's recommendations, together with argument in support thereof, regarding the future development of the Territory. It is particularly to these latter aspects of the report that the memorandum is directed, setting out the Government's policy and contemplated course of action pursuant thereto.

It will be apparent, therefore, that these two documents are relevant to some of the major issues in the present proceedings, and in particular to those relating to the alleged violations of Article 2 of the Mandate. Inasmuch as their publication has come after the filing of the Counter-Memorial, it seems that full analysis and discussion of their contents and significance may have to await the Oral Proceedings. However, with a view to facilitating reference and discussion, whether in the further pleadings or in the Oral Proceedings or in both, Respondent now wishes

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[1] Officially designated the Commission of Enquiry into South West Africa Affairs, and commonly referred to as the Odendaal Commission.

[2] *Vide* Counter-Memorial, Book IV, Chap. VII, para. 35; Book V, sec. C, Chap. III, para. 33; sec. E, Chap. I, para. 106.

[3] *Ibid.*, Book IV, Chap. VII, para. 35.

[4] R.P. No. 12/1964.

[5] For convenient reference this memorandum is reprinted as Annex A to this Supplement.

to introduce the said report and memorandum formally to the record as relevant documents, and to provide a brief guide to their more salient parts. Main features only are mentioned, and only by way of brief summary.

To enable members of the Court to find passages in the Commission's report and in the memorandum on any of the more important matters that have also received attention in the Counter-Memorial, Annex B hereto contains a comparative table correlating the contents of these three documents.

Government and Citizenship

3. The Commission recommended that homelands be constituted as self-governing areas for several non-White groups [1]. The Government's attitude in this regard is set out in the following passage from the memorandum:

> "The Government wishes to state clearly once again that its general attitude . . . *inter alia*, involves agreement with the Commission's finding that the objective of self-determination for the various population groups will, in the circumstances prevailing in the Territory, not be promoted by the establishment of a single multiracial central authority in which the whole population could potentially be represented, but in which some groups would in fact dominate others. (Report, p. 55, paras. 183 to 190.) The Government also endorses the view that it should be the aim, as far as practicable, to develop for each population group its own Homeland, in which it can attain self-determination and self-realization. (Report, p. 55, para. 190.) The Government moreover accepts that for this purpose considerable additional portions of the Territory, including areas now owned by White persons, should be made available to certain non-White groups. And it shares the view that there should be no unnecessary delay in taking the next steps in regard to this important aspect of the development of the population groups concerned [2]."

However, by reason, *inter alia*, of considerations pertaining to the present proceedings, the Government refrained from taking any immediate decisions in regard to the Commission's concrete proposals for constituting parts of the Territory as self-governing homelands for various non-White groups [3]. This applies also to other recommendations inseparably connected with the homelands plan, such as, for example, those relating to new councils for local self-government of the non-White inhabitants of towns and townships in the White areas [4].

Development Projects

4. The Commission recommended a five-year plan involving extensive development projects in the economic and social spheres. The projects

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[1] *Vide* Report, pp. 81-107, paras. 298-416.
[2] *Vide* Annex A, para. 21, *infra*.
[3] *Ibid.*, paras. 21 and 22.
[4] *Ibid.*, para. 21.

which the Government has decided should be implemented as soon as possible [1] relate to the following main subjects:

(a) The supply of water and electricity, including the Kunene scheme for the supply of water to Ovamboland and of electricity to the northern and central areas of South West Africa [2].
(b) The improvement of transport facilities, and, in particular, roads and air services, as a means towards further economic development and expansion of social and health services [3].
(c) Development of the mining industry and encouragement of increased participation therein by non-White inhabitants [4].
(d) Industrial development, especially in Native areas [5].
(e) Improvement of agriculture in Native areas [6].
(f) Improvement of educational services, particularly for non-White inhabitants [7].
(g) Improvement of health services, particularly for non-White inhabitants [8].
(h) Purchase of White-owned farms and town properties for possible future incorporation in homelands, and for a settlement scheme for Coloured persons [9].

The cost of this five-year plan will, in the Commission's estimate, exceed R150 million (£75 million) [10].

Administrative and Financial Arrangements

5. The Commission recommended a reorganization of administrative functions as between organs of the Territory and those of the Republic of South Africa, as well as concomitant changes in financial relations [11]. In making these recommendations, the Commission was influenced by the nature and extent of the new phase of development envisaged by it, by the resultant advisability of making use of the Republic's facilities in the fields of expert guidance, technical knowledge and effective planning, as well as of its financial resources, and by the desirability of eliminating overlapping of functions and responsibility [12].

The Government expressed its belief—

> "that closer investigation will confirm that the major development projects contemplated, particularly in the interests of the non-White population groups, can be carried out to the best advantage through

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[1] Annex A, para. 6.
[2] *Ibid.*, para. 7.
[3] *Ibid.*, para. 8.
[4] *Ibid.*, para. 9.
[5] *Ibid.*, para. 10.
[6] *Ibid.*, para. 11.
[7] *Ibid.*, para. 12.
[8] *Ibid.*, para. 13.
[9] *Ibid.*, para. 14.
[10] *Ibid.*, para. 23.
[11] *Vide* Report, pp. 61-63, paras. 214-225 and 229-235, and see also, for example, p. 263, paras. 1102-1103; p. 309, paras. 1283 (3)-(5); p. 377, introductory part of para. 1368; p. 455, paras. 1479-1480.
[12] *Vide* in particular Report, p. 61, paras. 215-220.

> greater financial and administrative contributions thereto from the Republic, of the nature envisaged in the recommendations [1]".

However, the Government decided—

> "that it cannot take general decisions on either the new administrative or the new financial arrangements before full details have in both cases been carefully worked out, in order to determine what every change will involve and, particularly, the precise manner in which every changeover will be effected in practice [2]".

A Committee of Experts will therefore be appointed to consider the detailed aspects of the Commission's proposals in this regard, which are, in any event, also affected by considerations concerning the present proceedings [3].

Pending the report of the Committee of Experts and the conclusion of the present proceedings, the existing administrative and financial arrangements will continue subject to *ad hoc* adaptations to meet special circumstances [4].

(Sgd.) R. McGREGOR.

(Sgd.) J. P. VERLOREN VAN THEMAAT.

Agents of the Government of the
Republic of South Africa

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[1] *Vide* Annex A, para. 21, *infra*.
[2] *Ibid.*, para. 15.
[3] *Ibid.*, paras. 21 and 22.
[4] *Ibid.*, paras. 24 to 27.

Annexes to the Supplement to the Counter-Memorial filed by the Government of the Republic of South Africa

Annex A

DECISIONS BY THE GOVERNMENT ON THE RECOMMENDATIONS OF THE COMMISSION OF ENQUIRY INTO SOUTH WEST AFRICA AFFAIRS

With reference to the Report of the Commission of Enquiry into South West Africa Affairs, the Government desires to announce:

(a) its attitude regarding the future course of development recommended by the Commission;
(b) its decisions regarding projects to be undertaken immediately; and
(c) its approach to the other recommendations, on which, for some reason or other, decisions are not being taken immediately.

To begin with, the Government's reasons for appointing the Commission are briefly outlined.

A. THE REASONS FOR THE APPOINTMENT OF THE COMMISSION

1. Throughout the period of administration of South West Africa by the South African Government—now in excess of 40 years—policy relating to the government of the Territory has been founded on the principles—

(a) that full power of administration and legislation over the Territory, as an integral portion of South Africa, is vested in the South African Government, with the power to apply the laws of South Africa to the Territory, subject to such local modifications as circumstances may require; and
(b) that the South African Government's administrative and legislative powers are exercised for the purpose of promoting to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory.

These principles were also fundamental to the provisions of the Mandate in respect of South West Africa. In spite of the Government's view that the Mandate has in law ceased to exist, its policy has always been, and still is, to proceed with the administration of the Territory on the basis of these principles.

2. In order better to perform their duties of administration and development, successive Governments have in the past found it necessary, when faced with problems concerning the administration of South West Africa or when deeming it opportune to embark upon a new phase of development, to appoint commissions of enquiry to furnish the Government with expert advice. During the period of administration of the Territory more than 70 commissions have investigated a great variety of matters, some with a wider and others with a more restricted ambit, and

in pursuance of their recommendations constant progress has been made in the development of the Territory.

3. The appointment of the present Commission arose from the Government's view that the time was ripe for a far-reaching new phase of development in South West Africa. 'Although impressive progress had in the past been made in practically every sphere, as is evident also throughout the Commission's report, this had occurred in the face of a number of adverse circumstances beyond the Government's control, which had in some instances retarded development of the Territory and its inhabitants and in others even caused setbacks thereto. Included in the latter class of circumstances were several exceptionally severe droughts, the economic depression of the thirties and the Second World War. In the former class there were the basic problems arising from the necessity of building up a modern economy in a territory with very limited available resources: for this was the main method by which funds could be provided for programmes of advancement of the indigenous population, which at the inception of the mandatory administration was for the most part on a very low level of development. South African Governments, although under no obligation in terms of the Mandate to do so, made considerable contributions from their own funds to the development of the Territory, as also appears from the Commission's report (e.g., p. 325, para. 1293). However, by reason, *inter alia*, of the need for development in South Africa itself, there were limits to the assistance which could be rendered to South West Africa. Furthermore, progress in the educational, social and political spheres was in the past greatly retarded by relative lack of interest and co-operation on the part of members of the indigenous non-White groups.

4. Considerable changes have, however, taken place in the above-mentioned limiting circumstances, particularly during the last 10 to 15 years. The great progress which has been made in developing the Territory's economy, coupled with the economic upsurge in the Republic itself, has rendered more funds potentially available for intensive advancement projects. An awakening of interest in political, social and educational matters began to manifest itself amongst the non-White groups of South West Africa, with the result that on the foundations previously laid by the authorities, standards could be raised at an increased pace. It is in these circumstances that the Government considered that the time was ripe for a considerable acceleration in co-ordinated planned development and advancement in all spheres. The Commission, which consisted of experts from outside the political arena, was accordingly appointed, as expressed in its terms of reference, "to enquire thoroughly into further promoting the material and moral welfare and the social progress of the inhabitants of South West Africa, and more particularly its non-White inhabitants", and pursuant to such enquiry to prepare "a comprehensive five-year plan for the accelerated development of the various non-White groups". The Commission has completed its task and its report was tabled on 27 January 1964.

B. THE GOVERNMENT'S ATTITUDE CONCERNING THE FUTURE COURSE OF DEVELOPMENT

5. The Government appreciates the contents of the Commission's report, not only on account of the valuable compilation and arrangement

of data comprised in it, but also in view of the general purport of the argument and recommendations. *Due regard being had to what follows hereinafter, the Government accepts the report in broad principle.*

This decision does not imply that the Government identifies itself with every detailed aspect of the argument, nor that it has already decided, or will now decide, upon the acceptability of every particular recommendation. It does mean, however, that the Government accepts the main features of the argument and recommendations as an indication of the general course to be adopted in the next phase of the development of South West Africa and of the promotion of the well-being and progress of its inhabitants.

Pursuant to this general attitude, the approximately 475 recommendations of the Commission will be dealt with as falling into three categories, namely—

(a) recommendations concerning projects to be undertaken immediately, and on which the decisions hereby announced have consequently been taken;

(b) recommendations concerning matters of such a purely administrative nature that the authorities responsible for their implementation will have to take decisions thereon as the occasion arises; and

(c) recommendations on which no decisions are taken at this stage in that they are advanced by the Commission as being for future consideration, or that the time is not considered opportune for their implementation, or for other reasons, and concerning which the Government will announce its intentions to the country and to Parliament in an appropriate manner when a decision on implementation is taken.

C. DECISIONS HEREBY ANNOUNCED

6. The Government is firmly convinced that certain recommended projects are basic to further development and should be executed immediately and on a large scale. Some of these projects are directed at the economic benefit of and service to all the inhabitants of the Territory, others have as their object the special benefit of and service to particular communities or groups, especially non-White groups. *The Government has decided that implementation of such projects is to commence immediately, and that they are to be brought to completion with the least delay possible.*

Examples of projects included in this immediate programme, and therefore covered by the decisions concerning implementation, are given in the following paragraphs [1].

Supply of Water and Electricity

7. The Commission regards the generation of electricity on the Kunene as the most important contribution which the State could make towards

[1] The exposition concerns only the *contents* of the projects: questions of procedure, control and financial arrangements are dealt with later (particularly in paragraphs 24 to 27 hereunder). Moreover, only the broad outlines are indicated: some of the detailed aspects are subject to further consideration and possible adjustment, mostly in the course of administrative action.

the further economic development of South West Africa. (Report, p. 447, para. 1473.)

The Commission also points out that it is the greatest single contribution that can be made at this juncture to the general progress of particularly the northern areas, where the concentration and increase of population are the greatest. (Report, p. 439, para. 1464.) Complementary to the supply of electricity, and associated with it, is the satisfaction of the urgent need for a more regular water supply for man and beast. It is consequently at these objectives that the greatest single item of expenditure within the framework of the Commission's recommendations is directed.

The following projects, requiring an estimated total expenditure of R72,300,000, are included under this head:

(a) the completion of the Etaka section of the canal scheme for the supply of water in Ovamboland, at an estimated cost of R300,000, as proposed in an interim recommendation of the Commission and already undertaken by the Government last year (Report, p. 495, paras. 1532 and 1533);

(b) the first five-year plan for the supply of water and electricity, which includes:

(i) the Kunene Scheme, at an estimated cost of R49 million for the supply of electricity to the northern and central areas of South West Africa (Report, pp. 449-451, para. 1476 A (1));

(ii) the further development of the Ovamboland Canals Water Supply Scheme (linked with the Kunene Scheme), at an estimated cost of R4 million. Strategically located canals and pipelines will traverse the more densely populated areas. (Report, p. 451, para. 1476 A (2).) One of the most important reasons for the purchase of power from Matala, and for the consequent erection of a power line from that point to the Ovamboland border (a part of the Kunene Scheme), is that electric power could thus be made available fairly soon for pumping water from the Kunene to Ovamboland (p. 449, para. 1476 A (1) (i));

(iii) a number of dam projects for the supply of water to the Namas, Damaras and Hereros, and also to the towns of Windhoek and Keetmanshoop, at an estimated total cost of R16,100,000 (Report, pp. 451-453, para. 1476 A (3)-(8));

(iv) boreholes and small dams in several Native Reserves, at an estimated total cost of R1,550,000 (Report, p. 453, para. 1476 A (9)); and

(v) an Irrigation Scheme for the Orange River Settlement for Coloured persons, at an estimated cost of R1,350,000 (Report, p. 453, para. 1476 A (10) and p. 109, para. 422).

In the process of development several difficulties will have to be ironed out; for example, certain final arrangements concerning the Kunene Scheme are now being made with the Portuguese authorities. As the Commission itself indicates, some other matters within the framework of these projects will also require further consideration.

Transport

8. *(a)* Roads.

The Commission emphasizes that, in order to give effect to several important recommendations concerning the development of South West Africa, it is imperative that adequate roads, as indispensable communications, be constructed as soon as possible. (Report, p. 377, para. 1368.)

Apart from the roads which are to be constructed in the normal course of development by the Administration of South West Africa, the following roads will, in accordance with the Commission's recommendations, be taken in hand:

(i) *Main Roads*: Twelve roads fall under this head, five of which will be provided wholly or partly with a tarred surface. Some of these roads will serve as main links within South West Africa itself, others as main links between the Territory and the Republic of South Africa. (See also para. 20 of this memorandum in regard to the proposed connecting road between Runtu and Katima Mulilo.) The total estimated cost of these roads is R32,500,000. (Report, p. 477, para. 1501 *(d)*.) This amount is *additional to* the sums reflected in the summary of estimated costs of the first five-year plan, as set out in paragraph 1509 of the report (p. 481).

(ii) *Internal Roads*: Provision is made under six heads for the construction of 700 miles of roads as internal connecting links in non-White areas, at a total cost of R8,400,000. (Report, p. 377, para. 1370, and p. 481, para. 1509 (8).) In accordance with the existing administrative arrangement, the Department of Bantu Administration and Development will, at least for the present, have to assume responsibility for these roads.

The estimated expenditure on roads to be constructed under the five-year plan will therefore amount to almost R41 million.

During the past ten years the Administration of South West Africa has undertaken an extensive road construction programme, the annual estimates under this sub-head amounting to approximately R7 million in 1963. (Report, p. 373, para. 1343.) In addition to the programmes referred to in sub-paragraphs (i) and (ii), the Administration of South West Africa will in the future continue with its road construction programme, although on a smaller scale, in as much as some of its normal tasks will now be included in the programmes under (i) and (ii).

(b) Air Services.

The Commission points out that distances in South West Africa are vast and that the Territory is sparsely populated. Even where good roads are available, travel by road is time-consuming. Moreover, within the framework of the major road construction programme, several years will probably elapse before some regions are served by adequate roads. (Report, p. 387, para. 1374.) In order to expedite the first phase of development, suitable airfields at certain points are therefore urgently required. (Report, p. 495, para. 1537.) Similarly, certain proposed services, *inter alia*, in the field of health, cannot be made available forthwith to the population groups concerned unless air service facilities are extended without delay. (See para. 13, below.)

The programme for the construction and extension of airfields, on

which the Government has decided in accordance with the Commission's recommendations, includes—

(i) *Principal Airfields*: Sixteen airfields are included under this head, three of which, namely those at Ruacana, Grootfontein and Windhoek, are the most urgently required. (Report, p. 391, para. 1375 *(a)* and *(b)* and p. 389, para. 1374 (3) *(a)*.)

(ii) *Secondary Airfields*, which are necessary for the services to be rendered by medical practitioners and government officials. These airfields can also be used for emergency landings by aircraft which normally use the principal airfields. Thirty-one such secondary airfields are contemplated. (Report, p. 391, para. 1375 *c)* and p. 389, para. 1374 (3) *(b)*.)

(iii) *Private Airfields and Emergency Landing Strips*: In respect of defined private airfields (according to the Commission there are approximately 60 such airfields) a maintenance grant will be made. (Report, p. 391, para. 1375 *(d)* and para. 1374 (3) *(c)*.)

An amount of R3 million is reflected in the five-year plan as the direct contribution of the Republic to this programme. (Report, p. 481, para. 1509.) The total cost will naturally be much higher (Report, p. 481, para. 1509), and the Republic will consequently make further contributions thereto by assisting in the provision of additional funds.

(c) Railways.

The Commission finds that South West Africa is well served with rail and road transport services. For example, during the last ten-and-a-half year period alone R72 million was spent on modernizing and improving the railway system. The value of rolling stock, excluding locomotives, at present in service is R33 million. It was not necessary for South West Africa itself to find any portion of these amounts, totalling R105 million. (Report, p. 381, para. 1373 (2) *(a)* (iii).)

The capital investment was made in spite of large working losses. The accumulated loss for the period 1 April 1922 to 31 March 1963, amounted to R51,380,808. (Report, p. 385, para. 1373 (6).)

The Commission recommends that the split tariff at present applicable to South West Africa be abolished and a uniform tariff system introduced. It contemplates that implementation of this proposal will have the effect of increasing the annual working losses by R1 million to R3,500,000. (Report, p. 475, para. 1501 (1) *(b)*.) The Commission further recommends that this loss should be borne by the Republic as an annual subsidy or contribution to the economic development of the population of South West Africa (Report, p. 459, para. 1483). The Commission's recommendations in both of the said respects form an integral part of its proposals for new financial and administrative relations between the Territory and the Republic—a matter on which the Government, for the reasons set out in paragraphs 15 and 20 to 22 of this memorandum, is taking no decision at this stage. Pending such decision the Government nevertheless wishes to leave no doubt, and therefore now announces, that in the event of fiscal and administrative reorganization as contemplated by the Commission, the above recommendations regarding railway matters will be implemented—and even the accumulated capital losses could be written off—in all cases subject only to administrative consideration at the relevant stage and adjustment, where necessary, of matters of detail.

Mining

9. The Commission points out that there are possibilities for the further development of mining in South West Africa, and in accordance with its recommendations it has been decided—

(a) to organize the exploration and mapping of the whole Territory (Report, p. 457, para. 1481 *(a)-(d)*);

(b) to assist and encourage the inhabitants of the non-White areas in prospecting and exploiting the mineral occurrences in such areas (Report, p. 457, para. 1481 *(g)*);

(c) to arrange for an investigation into the mining taxation structure in South West Africa (Report, p. 457, para. 1481 *(h)*). The Government considers this investigation of particular importance, since the policy has always been that a reasonable share of the proceeds from mining should accrue to the State, by way of taxation and royalties, for utilization in promoting the interests of all the population groups in the Territory.

Industries

10. Decisions on many of the recommendations relating to industrial development must await the general decisions on financial and administrative arrangements (see paras. 15 and 20-22 of this memorandum). It has, however, been decided that with the assistance of the Bantu Investment Corporation special attention will forthwith be given, in accordance with the Commission's recommendations, to—

(a) the efficient marketing of livestock from the northern areas, including, *inter alia*, the establishment of a meat-canning factory, as well as the development of the marketing of hides and the tanning and local processing of leather (Report, p. 459, para. 1482 *(k)* (i));

(b) the establishment of a furniture factory in Ovamboland (Report, para. 1482 *(k)* (ii));

(c) the rendering of assistance in connection with the decortication of jute in the Okavango (para. 1482 *(k)* (iii));

(d) the possibility of exploiting the salt pans in Ovamboland (para. 1482 *(k)* (iv));

(e) the marketing of wood-carvings, basket work and matting, and the improvement of these home industries (para. 1482 *(k)* (v)); and

(f) the possibility of establishing a clothing factory in Ovamboland (para. 1482 *(k)* (vi)).

Agriculture

11. In addition to the large-scale water supply schemes (see para. 7, above), it is the Government's aim, pursuant to the recommendations of the Commission, to place agriculture in the Native areas on a firmer and more scientific basis. Professional research, education and guidance will be extended by the provision of experimental farms, demonstration farms and training facilities for the non-White groups (Report, p. 309, para. 1283 (10) to (12) and (14) to (15)), as well as by the appointment of professional agricultural officers to advise and assist non-White farmers (p. 309, para. 1283 (7) to (9)).

Further investigation and research will take place in the Okavango territory in connection with the cultivation of groundnuts and jute, two crops which are new to the inhabitants of that territory, but the potentialities of which have already been largely demonstrated, and which could make a substantial contribution to the agricultural economy. (Report, pp. 307 and 309, paras. *1269 to 1281.*)

In order to enable the stock farmers of the northern Native area to obtain an export market for their livestock and livestock products, a large-scale inoculation campaign against lung disease will be initiated, together with strict control measures to prevent the movement of infected animals (p. 279, para. 1184 (1) and (2)). In addition, provision will be made for quarantine facilities in the form of quarantine farms and quarantine abattoirs equipped with the necessary cold-storage facilities. By means of these facilities, the export of livestock, boned and frozen carcasses, disinfected hides and horns, etc., to meat-canning factories and other markets in the south will be made possible (p. 279, para. 1184 (3) to (5)).

Education

12. In the phase of development now embarked upon, education will necessarily play an important part.

The progress already made in this field appears, *inter alia*, from the school attendance figures and percentages of the various groups. In the case of the White group, virtually 100 per cent. of the possible school population was enrolled in 1962 (p. 223, para. 958). In the case of the Coloured and Baster communities the school attendance figure was more than doubled between the years 1950 and 1962, namely from 2,528 to 6,235 (p. 225, table LXXIV); according to the Commission's calculation the latter figure represented almost 90 per cent. of the possible school population (p. 225, para. 961). As regards the indigenous groups the attendance figure was also more than doubled—from 22,659 in 1950 to 47,088 in 1962 (p. 227, tables LXXV and LXXVI). It is estimated by the Commission that the last-mentioned figure represented about 46 per cent. of the over-all possible school population (p. 227, para. 964), and that the corresponding percentages in the northern and southern reserves were 47 and 54 respectively (p. 253, para. 1043). Against this background the significance will be appreciated of the Commission's recommendations for a special development programme particularly in respect of the indigenous groups, one of the immediate targets being to increase the attendance figure to about 60 per cent. in all Native reserves or homelands by 1970 (p. 253, para. 1048).

Development of Educational Services. (Report, pp. 247 to 255, paras. 1023 to 1054.)

In giving effect to the Commission's recommendations, provision will be made for more advanced and greater numbers of schools, hostel facilities and facilities for the training of teachers. This applies mainly to the areas of the non-White groups, where the Commission estimates that expenditure on schools, hostels and training centres will amount to R3,500,000 during the first five years. (Report, p. 481, para. 1509.) Within the framework of this general decision, the details of the recommendations must in the nature of things be left for decision by the educational authorities.

Nature of Educational Services. (Report, pp. 255 to 261, paras. 1055 to 1097.)

In this respect also, the Government's decision is in general to give effect to the Commission's recommendations concerning the extension and improvement of the nature of the educational services, whereby wider and better educational opportunities will be created, particularly for the non-White population groups. Here again, decisions concerning details must be entrusted to the educational authorities.

Health Services

13. The improvement and extension of the Territory's health services have for a considerable time received the active attention of the Administration of South West Africa, *inter alia*, pursuant to interim recommendations of the Commission. Substantial progress has, for example, already been made in the erection of a tuberculosis and general hospital at Okatana, Ovamboland, pursuant to recommendations by the Commission on 29 November 1962 (see p. 493, paras. 1528-1529 of the Report). The total cost will be R1,400,000.

In pursuance of the Commission's recommendations the Government also intends to encourage, and where necessary to assist, the Administration to proceed immediately with a comprehensive programme of combating and preventing disease, particularly amongst the non-White groups. This programme will include, *inter alia*, the erection in due course of at least 20 new hospitals and clinics for the non-White groups, apart from the development and extension of existing establishments (p. 201, paras. 893, 896, 899, 901; p. 203, paras. 902, 904, 909). The estimated direct contribution of the Republic under the five-year plan will be R1,500,000 (p. 481, para. 1509). The total cost will of course be much higher, and the Republic will consequently also provide assistance in obtaining the further funds required. In addition a greater number of district surgeons and other medical practitioners, as well as nurses, health inspectors and other staff will be appointed, training facilities for non-White medical personnel established and improved, and special efforts made to obtain an adequate number of other personnel, in order to render all the necessary health services and to attain as far as possible the aims set by the Commission (p. 199, para. 889; p. 201, paras. 892, 895, 898, 900; p. 203, paras. 903, 905, 908, 910; p. 205, para. 913). Comprehensive campaigns to combat malaria, tuberculosis and other diseases will be initiated (p. 201, paras. 891, 894, 897, 901 (ii); p. 203, paras. 902 (iii), 907). Ambulance services, service flights by specialists and a medical radio service will be utilized as far as practicable to bring expert medical assistance to the remotest corners of the Native areas (p. 197, paras. 873, 874 and 876).

Besides these direct services, missions will continue to be subsidized in order to enable them to complement as effectively as possible the services provided by the State (p. 199, paras. 886 and 887).

The Government accepts that the contemplated extension of services will involve a corresponding increase in the health estimates (p. 199, para. 884). In this case also, decisions concerning details will have to be taken from day to day by the administering authorities.

Purchase of Land

14. In several cases the Commission proposes that White-owned farms should be purchased with a view to including the land in contemplated non-White homelands. (Report, p. 87, para. 326 *(b)* (ii); pp. 89-93, paras. 337 (vii) and 339; p. 95, paras. 352 (v) and 353; p. 101, para. 388; pp. 101 and 103, paras. 393 (vi) and 395.)

For the reasons set out in paragraph 21 below, no decisions are at present taken on the Commission's recommendations with regard to constituting homelands as self-governing territories. The farms referred to above are, however, mentioned by name, and it would therefore be unreasonable to leave the owners concerned in doubt for a considerable time. The demarcation of new borders for homelands, should this be involved in eventual decisions, would also be facilitated if a considerable part of the required land should then be in the State's possession.

The Government has therefore decided that in all cases where, in the areas indicated, the owner is prepared or desires to sell his farm now, it would be willing to enable the Administration of South West Africa, by the provision of funds, to purchase the farm as soon as possible at a reasonable price, which would include compensation for losses and inconvenience. Failing agreement, the price could be determined in accordance with the procedure applicable to expropriation. The farms thus purchased will be treated as government property and be available for any purposes subsequently decided upon.

With a view to inclusion in two of the contemplated homelands, the Commission proposes that Welwitschia township and townlands (Report, p. 89, para. 337) and Gibeon township and townlands (Report, p. 101, para. 393) should also be purchased. The same considerations are applicable here and, in respect of private property in these towns, the Government is prepared to make the same provision as in the case of the above-mentioned farms.

As regards the purchase of farms necessary for the Irrigation Settlement on the Orange River for Coloured persons (Report, p. 109, para. 422), it has been decided to recommend to the Administration of South West Africa that this should be proceeded with, and assistance will be rendered where necessary by the provision of funds. In this instance nothing more is involved than an ordinary settlement scheme for needy and rural Coloured persons.

Appointment of a Special Committee of Experts

15. In the interest of the large-scale development which the Commission contemplates for the Territory of South West Africa, it proposes, in a series of recommendations, a rearrangement of administrative and financial relations between the Republic and South West Africa. (Report, pp. 61-63, paras. 214-225 and 229-235, and see also, for example, p. 263, paras. 1102-1103; p. 309, para. 1283 (3)-(5); p. 377, introductory part of para. 1368; p. 455, paras. 1479 and 1480.) As regards the nature of the administrative reorganization, the Commission's views are set out fairly fully, but for the purpose of determining certain essentials of the new financial relations, it has recommended the appointment of a Special Committee of Financial Experts (Report, p. 63, para. 236). With reference to this particular proposal of the Commission, attention is invited to the

message of the State President already conveyed to Parliament, regarding a resolution of the Legislative Assembly of South West Africa.

The Government is, however, convinced that it cannot take general decisions on either the new administrative or the new financial arrangements before full details have in both cases been carefully worked out, in order to determine what every change will involve and, particularly, the precise manner in which every change-over will be effected in practice. This is not covered by recommendations which concern only the future form which the administration is to take.

The Government has therefore decided to accept the recommendation that a Committee of Experts be appointed, but its terms of reference will be much wider. It will have to enquire into and submit a report on all the practical problems to be taken into account when the rearrangement of administrative and financial relations is considered. This Committee will consist of officials and persons in authority from both the Republic and South West Africa. Their names will be announced as soon as possible.

Coloured Housing and Community Centres

16. The Government has decided, in accordance with the recommendations of the Commission, to make funds available where necessary for Coloured housing and community centres (Report, p. 481, para. 1509 (4)).

D. MATTERS ON WHICH THE AUTHORITIES CONCERNED WILL TAKE THEIR OWN DECISIONS

17. Many of the approximately 475 recommendations do not require decisions by the Government, in that they are of restricted application or concern details with which the departments, bodies or persons in charge of the administrative implementation of the policies and programmes decided upon, are authorized to deal. Most of these recommendations, if not all of them, contain very useful suggestions for application under any governmental system or policy.

The recommendations which involve such matters of detail are numerous and varied. Reference is here made to the following examples only: Recommendations concerning health services (Report, pp. 197-205); particular recommendations concerning educational facilities and services which do not involve a change of system, such as those regarding hostels (p. 249, para. 1033), syllabuses (p. 257, para. 1064), the training of teachers (p. 259, paras. 1072-1078), technical and special education (p. 259, paras. 1080-1084), conditions of service (p. 263, para. 1111); recommendations for the improvement of agricultural services and activities (p. 309, para. 1283 (7-15)); recommendations regarding certain airfields and air services (p. 391, para. 1375 *(e)-(h)*); prospecting work in co-operation with the Geological Survey Division (p. 457, para. 1481 *(e)*). Such matters of detail will in due course receive the attention of the appropriate authorities and do not at this stage require consideration or decision by the Government. Adjustments can naturally be made according to requirements. Should decisions by the Government or even Parliamentary approval appear to be essential in some instances, the necessary steps will be taken.

E. MATTERS TO BE DECIDED UPON LATER

18. Various reasons render immediate implementation of certain of the Commission's recommendations either impossible or undesirable, or make it impracticable for the Government to reach final decisions concerning the concrete steps to be taken. The following classification, in which there is some overlapping, serves as illustration.

(a) Long-Term Projects.

19. From their very nature, and as in fact envisaged by the Commission, certain recommendations do not fall to be considered with a view to immediate implementation, but will have to await the lapse of certain periods, the taking of steps which serve as preparation or which require priority, and the like. As examples, reference may be made to the recommendations concerning the Second and Third Five-year Plans. (Report, pp. 453 and 455, paras. 1477-1478; pp. 481 and 483, paras. 1510-1511.)

Pursuant to the Government's attitude as set out in paragraph 5 above, the necessary attention will be given to recommendations of this nature with a view to decisions at a later stage.

(b) Recommendations which Require Further Investigation and Consideration.

20. There are matters which require further investigation, information and consideration before the Government can reach any final decisions. In several cases the Commission itself has proposed such investigation. A striking example is the recommendation regarding expert enquiry into essential aspects of new financial relations, in respect whereof the decision of the Government to appoint a Committee with wider terms of reference has already been announced in paragraph 15 above. It follows that, notwithstanding the Commission's recommendations and until this Committee has submitted its report, no decisions will be taken on the series of recommendations concerning a change in the administrative relations between the Republic and South West Africa, or concerning a change in the financial arrangements and relations.

Another case in which the Commission itself proposes investigation before a decision is taken, appears in paragraph 1481 *(h)* (p. 457), concerning mining taxation. (See para. 9 *(c)* above.)

A recommendation regarding which the Government desires further investigation and information, concerns the construction of a connecting road between Runtu and Katima Mulilo (p. 377, para. 1368 (6)). Owing to problems concerning the administration of the Eastern Caprivi, the possibility of constructing such a connecting road was carefully investigated and considered in the past, but the conclusion then reached was that the project was impracticable by reason of geographical and environmental factors. The Commission's present proposal opens up interesting possibilities of considerable importance regarding the future administration and development of the Eastern Caprivi. In the circumstances the Government intends, before taking a decision, to initiate further investigation and tests in regard to the technical and economic possibilities and implications of such a project under present conditions.

(c) Recommendations Standing Over for Special Reasons.

21. In the case of certain recommendations, there is a combination of special reasons why it is not advisable or practicable to take final decisions at this stage, notwithstanding the fact that the Government is favourably disposed towards the trend of policy embraced in the recommendations concerned.

Homelands

The Commission's recommendations for constituting homelands, as self-governing areas for several non-White groups (pp. 81-107, paras. 298-416), afford an important example, These recommendations are at present affected by considerations pertaining to the pending case which has been instituted against the Republic by Liberia and Ethiopia in the International Court at The Hague, and on which the Government states its attitude more specifically in section F below. Apart from that, however, there are various reasons why it is in any event not practicable to proceed immediately with the constitution of entities of the nature proposed. In some instances, where the addition of considerable areas of land now in the private ownership of White persons is involved, there are problems which render impossible the effective demarcation and application of borders before the State has at its disposal at least the greater portion of the land required. Moreover, the final series of steps which could in a particular case lead to effective constitution, requires a measure of interaction between the State and the responsible authorities in the ethnic group concerned, in which there is reflected on the part of the group a sufficient degree of preparedness, as regards sense of responsibility and acceptance of the administrative and economic implications, to spell fair prospects of success for the undertaking. Different groups will naturally reach such a stage of preparedness at different times. It is also important that the projects for economic and other development in the different areas should be properly under way before the authorities concerned take over responsibility. All the factors mentioned point to a measure of inevitable delay, greater in the case of some groups and areas and less for others, before the recommended constitution of homelands as self-governing entities can occur. During such an interim period circumstances may develop which render desirable adjustments not foreseeable at the present stage.

The Government wishes to state clearly once again that its general attitude, as set out in paragraph 5 above, *inter alia*, involves agreement with the Commission's finding that the objective of self-determination for the various population groups will, in the circumstances prevailing in the Territory, not be promoted by the establishment of a single multiracial central authority in which the whole population could potentially be represented, but in which some groups would in fact dominate others. (Report, p. 55, paras. 183 to 190.) The Government also endorses the view that it should be the aim, as far as practicable, to develop for each population group its own homeland, in which it can attain self-determination and self-realization. (Report, p. 55, para. 190.) The Government moreover accepts that for this purpose considerable additional portions of the Territory, including areas now owned by White persons, should be made available to certain non-White groups. And it shares the view that

there should be no unnecessary delay in taking the next steps in regard to this important aspect of the development of the population groups concerned. In view, however, of all the abovementioned considerations, no decisions are at present being taken on any of the recommendations concerning the constitution of homelands as self-governing areas, the demarcation of their boundaries and changes in their forms of government.

Administrative and Financial Relations

The Commission's recommendations concerning a reorganization of administrative functions as between organs of the Territory and those of the Republic, and concerning the concomitant change in the financial relations, are affected by similar considerations, *inter alia*, concerning the pending Court case already mentioned, in addition to the need for further expert enquiry as already dealt with in paragraph 15 above.

Here also the Government desires to state clearly that it is in agreement with the general view of the Commission, and believes that closer investigation will confirm that the major development projects contemplated, particularly in the interests of the non-White population groups, can be carried out to the best advantage through greater financial and administrative contributions thereto from the Republic, of the nature envisaged in the recommendations. But in this regard too, owing to the combination of considerations mentioned above, no decisions concerning implementation are at present being taken.

Recommendations Connected with the Foregoing

Certain of the Commission's recommendations are necessarily or inseparably connected with those which are standing over for the time being for the reasons just dealt with. An example of necessary connection with the Commission's homelands scheme is afforded by the recommendations relating to new councils for local self-government of the non-White inhabitants of towns and townships in the White areas. (Report, pp. 117-119, paras. 445-453.) Although the Government is in principle strongly in favour of a development which will along these lines afford an increasing measure of local self-government to the non-White groups concerned, decisions regarding the practical steps to be taken are for the time being standing over for the above reasons. Other examples of such connection with the homelands scheme are the recommendation concerning a Co-ordinating Committee (Report, p. 487, para. 1517) and the recommendations on the buying out of certain non-White reserved areas. (Report, p. 107, para. 411.)

By way of contrast, there are recommendations which may in the wording used by the Commission be coupled with the concept of homelands, or with control by a department other than the one hitherto responsible, but where the connection is not necessary or inseparable, and where the development, particularly in the interests of the Natives, cannot on the Government's responsibility be held in abeyance. (See for example the wording of paras. 1368 and 1370, p. 377, regarding roads, and para. 1481 *(g)*, p. 457, regarding mining.) In such cases, adjustments must be made administratively in the course of events, regard being had to the interim

arrangements indicated in paragraphs 24 to 26 below and, where necessary, with the assistance of the Liaison Committee mentioned in paragraph 27.

F. THE GOVERNMENT'S ATTITUDE CONCERNING THE CASE PENDING BEFORE THE INTERNATIONAL COURT

22. According to present indications, the hearing on the merits of the case pending before the International Court of Justice, and already referred to above (para. 21), will probably occur during 1965.

It is an established principle in regard to pending cases that a party should refrain from action which may prejudice the alleged rights of the other party or parties, that is to say those rights to which claim is laid in the case. The Statute and Rules of the International Court specifically provide that the Court can, of its own accord or on the application of a party, issue interim measures with a view to preventing such action.

Notwithstanding its well-known reservations concerning, *inter alia*, the jurisdiction of the Court, the Government abides by its decision announced in Parliament last year, namely to participate in the proceedings on the merits and to present its case thereon to the Court. Consequently it is the Government's intention to observe the said principle and thus to obviate unnecessary further complication of the case through proceedings concerning possible interim measures. Until the case has been concluded, the Government will therefore refrain from action which may be regarded—even theoretically—as detrimental or prejudicial to the alleged rights of the Applicant States, or which may unnecessarily aggravate or extend the dispute before the Court. This attitude is in entire accord with the *sub judice* principle, which has been observed by the Republic even where it was not respected by others, for example in proceedings at the United Nations.

The most important examples of recommendations affected by the abovementioned considerations have already been mentioned in paragraph 21 above, namely those relating to the constitution of homelands as self-governing areas for the various non-White groups, those concerning a reorganization of administrative functions and new financial relations between the Territory and the Republic, and those which are necessarily or inseparably connected with some or other of the aforegoing. It has already been indicated that in all these cases, notwithstanding the Government's agreement with the broad trend of policy contained in the recommendations, there are also other reasons why it is necessary or desirable that implementation and decisions thereon should stand over for the time being. Considerations relating to the Court case therefore do not for the present make a practical difference in these respects.

Another example of recommendations which might be affected by reason of potential extension or aggravation of the dispute, is that concerning the supply of liquor to Natives. (Report, p. 487, para. 1513.) A decision on this recommendation therefore also stands over until after the conclusion of the Court case.

The considerations, apart from the Court case, which have a retarding effect on the implementation of and the taking of decisions on the abovementioned recommendations, will doubtless continue to apply in some respects even when the case has been concluded. In other respects they

may possibly have lapsed or been overcome at an earlier stage. In the latter event, decisions and implementation will nevertheless be held over until the conclusion of the Court case.

G. FINANCIAL IMPLICATIONS OF DECISIONS AND INTERIM ARRANGEMENTS FOR THEIR IMPLEMENTATION

The Five-Year Plan

23. It will be clear from the foregoing that the Government has decided to commence immediately with the implementation of most of the recommendations which are summarized by the Commission, together with their financial implications, under the First Five-year Plan. (Report, p. 481, para. 1509.) The portion of the five-year plan which will be undertaken will therefore represent an amount of at least R110 million on the basis of the Commission's estimates (as against the R115 million contemplated by the Commission, of which at the most R5 million is inseparably connected with the creation of homelands and is therefore provisionally left in abeyance).

This amount is of course not an indication of the total financial burden which will be involved, by way of loans or contributions, in the contemplated development of South West Africa over the next five years. Paragraph 1509 of the report shows that an annual net shortfall will also have to be met. Over the five-year period, and on the basis of the Commission's comprehensive recommendations, the expected shortfall will amount to more than R41 million. This raises the total amount to be financed from South African and South West African sources to over R150 million. But even this amount does not accurately reflect the compass of the whole development programme for South West Africa, since a considerable portion of the Administration's estimates will over the period in question also concern development projects.

Interim Financial and Administrative Arrangements

24. In its recommendations the Commission envisaged that the large development projects which are contemplated should be financed in accordance with a new financial relationship which, *inter alia*, was to be investigated and determined by a committee of financial experts. (See para. 15 above.) The Commission also envisaged that, in most cases, the projects would be dealt with by the well-equipped state departments of the Republic. (See para. 15 above.) The contemplated new arrangements in both fields, financial and administrative, can however, for the reasons dealt with in paragraphs 15 and 20 to 22 above, not be put into operation for the time being. It is consequently necessary to indicate how the work is to be carried out in the transitional period, and by which means the funds are to be made available in the meantime.

25. Responsibility for the implementation of decisions will rest with the Administrator and the Administration of South West Africa or with the Government of the Republic, depending upon which authority is at present responsible for matters of the relevant nature. In cases where the Administration of South West Africa is not equipped to take action itself, or for other reasons prefers to appoint an agent to carry out the work, it

can enlist the co-operation of expert bodies, such as the Industrial Development Corporation and the Electricity Supply Commission in connection with the Kunene water and electricity schemes, or of the National Transport Commission, or even of a state department of the Republic, such as the Department of Transport, for example, in connection with the construction of main roads or airports. Legislation has already been passed this Session enabling the Electricity Supply Commission to operate beyond the borders of the Republic, in accordance with the State President's announcement that, where necessary, legislation arising from the report would be introduced.

26. The funds required for the projects will as far as possible be drawn from the existing sources. Advances and shortfalls will in the meantime be covered by the Republic by means of loans to the Administration, the interest on which will be capitalized. Should financial and administrative rearrangements in accordance with the report be accepted and applied after the Committee of Experts has submitted its recommendations, responsibility will for the greater part devolve on the Government of the Republic. The latter will, as proposed in the report, undertake the further expenditure concerned from all the sources then at its disposal—which implies that shortfalls met in such circumstances from sources within the Republic will not subsequently be recoverable. Accumulated loan obligations incurred by the Administration of South West Africa as mentioned above, can be written off when the stage of financial and administrative reorganization is reached.

The Minister of Finance has announced in his Budget Speech that an amount of R20 million is being put aside this year for the development programme in South West Africa.

Loans raised elsewhere for the purpose of financing the major projects, such as the Kunene water and electricity scheme, will from the outset be dealt with by the Government of the Republic.

Liaison Committee

27. A special temporary committee will be appointed to serve as a link between the Central Government and the Administration of South West Africa, in order to ensure the smooth working of the abovementioned interim arrangements. Where necessary, the committee will further make special arrangements for the provision of expert assistance and information, technical and other staff, apparatus and implements, etc. The composition of this Liaison Committee will also be announced in the near future.

Annex B

COMPARATIVE TABLE

Subject	*Counter-Memorial*	*Odendaal Report*	*Memorandum (Annex A)*
(1) Geography, history and population	Book III (the whole) Book IV, Chap. III, II, pp. 399-403	Chapters I and II (pp. 9-43).	—
(2) Policies, including separate development	Book IV, Chapters IV-VII, II, pp. 404-488	Dealt with under Form of Government and Administration (Part C) and Concluding Review (Part N). See in particular paras. 183 to 190 (p. 55) and 1554 to 1557 (p. 515).	Para. 21
(3) Agriculture and land settlement	Book V, sec. B, Chap. I-V, III, pp. 2-39	Chapters XVIII to XXI (pp. 267-311).	Para. 11
(4) Fishing industry . . .	Book V, sec. C, Chap. II, III, pp. 42-46	Chap. XXIII, paras. 1322-1323 (pp. 345-353).	—
(5) Mining and minerals .	Book V, sec. C, Chap. III, III, pp. 47-63	Chap. XXII, paras. 1313-1321 (pp. 335-343).	Para. 9
(6) Railways and harbours	Book V, sec. C, Chap. IV, III, pp. 64-69	Chap. XXVI, para. 1373 (pp. 377-387).	Para. 8 *(c)*
(7) Labour conditions in the Police Zone	Book V, sec. C, Chap. VI, III, pp. 80-99	Chap. XXII, para. 1321*D* (p. 343); Chap. XXXII, para. 1518 (p. 487).	—
(8) Government and citizenship (including local government)	Book V, sec. E, Chap. I-IV, III, pp. 104-194 (see also item 2 above)	Chap. III-X (pp. 45-119).	Paras. 15, 21 and 22
(9) Local government . .	Book V, sec. E, Chap. III, III, pp. 167-193	Chap. IX and X (pp. 115-119).	Para. 21
(10) Rights of residence . .	Book VI, Chap. III, III, pp. 231-297	Chap. VI-X (pp. 67-119).	Paras. 21 and 22
(11) Education	Book VII, III (whole)	Chapters XVI-XVII (pp. 219-263). (Training of nurses dealt with under Health, part F. See in particular, para. 653 (p. 159); paras. 745-746 (p. 175); paras. 781, 783 and 789 (p. 181); paras. 798 and 801 (p. 183-185); para. 810 (p. 185); paras. 814 and 823 (p. 187); paras. 845-850 (p. 191); para. 889 *(b)* (p. 199); paras. 892 *(b)*, 895 *(b)*, 898 *(b)* and 900 *(b)* (p. 201); paras. 903 *(b)*, 905 *(b)*, 908 *(b)*, 910 *(b)* (p. 203); para. 913 *(b)* (p. 205).	Para. 12 (for training of nurses, see para. 13).

Annex C

LIST OF THE RELEVANT DOCUMENTATION

REPUBLIC OF SOUTH AFRICA—REPORTS OF COMMISSIONS

R.P. No. 12/1964, Report of the Commission of Enquiry into South West Africa Affairs.